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The titanic struggle for power now being waged between nations and between classes within the nations is as much one to change legal systems as to change political or economic systems. This involves far more than changing rules of property to achieve greater socialization, far more than imposing a Continental system of judicial procedure, far more than setting up a secret political police force. It goes to the very nature of the Court itself and would alter the foundation on which our Western civilization has built its legal systems.

—From the address of Mr. Justice Robert H. Jackson before the American Law Institute on May 20 *(Page 535)*

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communities for some form of world government. Our Association and its JOURNAL have urged that lawyers study and advise as to the practicable means of establishing and strengthening a juridical order in the world; the House of Delegates has given no support to current agitations for world government. The Hutchins Committee having produced a draft of a Constitution for a "Federal Republic of the World", this document brings some of the formidable problems "down to earth" in a tangible form. In furtherance of our policy of presenting different points of view so that our readers may evaluate and discuss them, we publish Ray Garrett's keen analysis and commentary as to the Hutchins Committee draft.

Assistance and Advice as to Drafting of Legislation **9**

A conference which has become an annual feature, between members of the Congress and representatives of our Association in the field of business law, took place in Washington on May 17. A variety of problems as to existing and proposed laws were open-mindedly explored, from angles of public interest and of expertness and accuracy in the drafting of legislation. The occasion was a tribute to the standing and influence which the representative organization of our Association has increasingly achieved in national affairs, through making the experience and skills of its members available to committees of the Congress, with the public interest put and kept always in first place.

International Legislation Resulting from the Bogota Conference **11**

Of high importance among the contents of this issue is Louis B. Sohn's summary and review of the large amount of international legislation emanating from the Bogota Conference in April and May, including the Charter of the Organization of American States, in which Chapter II reaffirms twelve stated "principles" and Chapter III is a declaration of the "fundamental rights and duties of states". Because of their far-reaching significance in present and future discussions, we give the text of these chapters in full and invite comment on them. We think that no lawyer who wishes to be well-informed should fail to read in this issue our department devoted to the development of international law; it contains much information which newspapers and magazines have not brought to public attention.

New Department as to Draftsmanship in Legislation **15**

At a time most opportune in view of various developments reported in this issue, the JOURNAL brings to fruition the plan which it has long had under consideration for a department devoted to developments in legislative draftsmanship and organization—federal and State. The Editor-in-Charge is Professor Harry W. Jones, of the authoritative Legislative Drafting Research Fund and the Columbia Law School. For its first month the department discusses the changes in legislative techniques and points of view made necessary or advisable by decisions of the Supreme Court on questions of constitutional powers of the Congress. With the contents of the new department should be read in this issue Mr. Justice Robert H. Jackson's address on the Court's interpretation of legislation, his arresting quotation at length from Lord MacMillan of Britain, our report of the meeting of the American Law Institute, and an editorial as to the new department. We regard this project as an imperative service to the public, the Congress, the States, the Courts and the profession—one of the most important things the JOURNAL could undertake at this crisis involving the future of law.

Results of Mail Balloting for State Delegates **16**

State delegates nominated by petition have been elected by mail ballot of the members for three-year terms in eighteen constituencies, and vacancies were filled in three States. There were lively contests in several States (see 34 A.B.A.J. 386; May, 1948), and a total of 10,250 votes were cast. The Board of Elections announces the results of their canvass. Among the notable newcomers to the House of Delegates is Cyril Coleman, one of the leading lawyers of Connecticut, member of our Association since 1931, at present the popular non-partisan mayor of Hartford.

Amendments of Our Association's Organic Law **24**

The Rules and Calendar Committee of the House of Delegates has drafted and filed a considerable grist of amendments of the Constitution and By-Laws of our Association on which the Committee will ask a vote in each the Assembly and the House of Delegates in Seattle. Notice of the proposed amendments and their text is given by publication in this issue. Some of them, especially that as to Article I of the Constitution, need study by our members; others are for re-arrangement or clarification.

American Law Institute Works on Its Commercial Code **25**

The 25th annual convocation of the American Law Institute was one of its largest and most interesting in many years, due in part to its joint session with the National Conference of Commissioners on Uniform State Laws. The "silver anniversary" of the Institute finds it devoting itself intensively and expertly to several tasks of substantial public importance—the drafting of its model Commercial Code, the advocacy of State adoption of its excellent model Youth Correction Authority Act, its plans for improving the income tax laws, and its furtherance of continuing legal education. In each of these projects the Institute has the active cooperation of our Association through one or more of its Sections. Our report of this year's meeting should interest the average lawyer.

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Members who wish to bring particular articles in the *Journal* to the attention of non-members can now arrange to have marked copies of the *Journal* sent from Chicago.

We are glad to make this service available, because the effectiveness of the *Journal*'s work for the profession and the public depends considerably on many of its articles, editorials, etc., being read by non-members.

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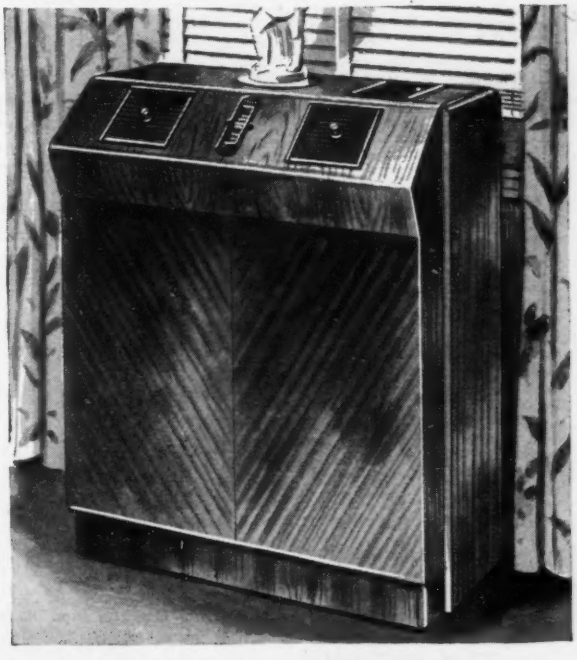

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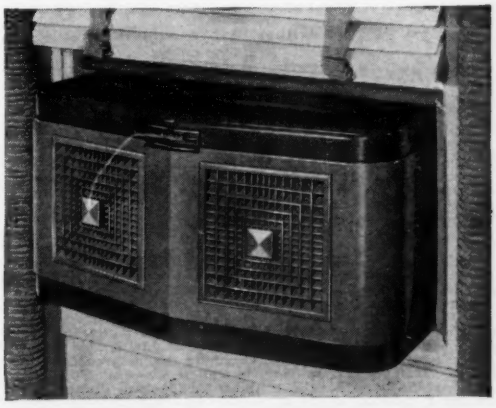

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of
ESSAY CONTEST
conducted by
SECTION OF ADMINISTRATIVE LAW
AMERICAN BAR ASSOCIATION
RULES FOR CONTESTANTS

Subject

Each contestant will write about State Administrative Law of the State in which he has been admitted to practice and practices law.

Cash Prize

One Thousand Dollars ($1,000)

Final date for submissions

Extended from November 1, 1948, as originally planned, to December 31, 1948.

To whom essays submitted

Secretary of Administrative Law Section, Miss Patricia H. Collins, Assistant Solicitor General's Office, Washington 25, D. C.

Eligibility

Contest will be open only to members of American Bar Association in good standing, including new members elected prior to December 1, 1948 (except officers of the Section and members of its Council, Chairman of the Contest Committee, and State Chairman) who have paid their annual dues to the Association for the current fiscal year.

No essay will be accepted if previously published. All rights and title to essays submitted must be deemed the property of the Section. Any copyright to an essay must be assigned to the Section.

Each essayist should review and analyze the Administrative Law of his State, both legislative and as evidenced by judicial decisions. All statements should be accompanied with citations to sources. Comparisons with Administrative Law of other jurisdictions may be made, but the theme of each essay must be the Administrative Law of the particular State concerning which it is written.

Each essay must be restricted to four thousand words including quoted matter and citations in the text. Footnotes or notes following the essay shall not be included in the computation of words but excessive use of such material may be penalized by the judges of the contest. Clearness, brevity of expression and thoroughness of analysis will be taken into considerations.

Inquiries concerning the contest should be addressed to Omar C. Spencer, Chairman, Contest Committee, Yeon Building, Portland 4, Oregon.

GEORGE ROSSMAN, Chairman,
Section of Administrative Law,
American Bar Association.
Salem, Oregon.

1

The Meaning of Statutes:

What Congress Says or What the Court Says

by **Robert H. Jackson** • Associate Justice of the Supreme Court of the United States

■ Listening to Mr. Justice Jackson's reflections, before the American Law Institute on May 20, concerning the continual conflict between the intent of the Congress as expressed in the text of a statute and what the Supreme Court says the legislative branch meant or should have meant in its enactment, brought back to mind a passage in Lewis Carroll's *Through the Looking-Glass*, which, as often on problems in government, summed up the issue very well:

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean — neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that is all."

The address was admirable in spirit and content; it dealt candidly with problems which confront our Courts, Bar and people — the conflict between two concepts of Courts, law and justice. "To carry out the Soviet conception requires a judge only to know which side he is on," declared the speaker. But as to our concept he added that "as the Courts are obligated by the principles of our representative government to independence in construing the language of statutes, so they owe a similar duty of fidelity to the legislative bodies in applying their policies". As to what is taking place in the guise of examining putative "legislative history" to determine intent, he declared that "The custom of remaking statutes to fit their histories has gone so far that a formal Act, read three times and voted on by Congress and approved by the President, is no longer a safe basis on which a lawyer may advise his client or a lower Court decide a case. . . . I do not see how Congress can know, even roughly, the effect that will ultimately be given to any language it may use". He seemed to indicate a belief that a statute should mean to a Court "what its language reasonably conveys to those who are expected to obey it".

In any event, this utterance by a member of the great Court was significant and timely, and should be read carefully by those concerned for the future of law.

■ It is an honor to greet this body of lawyers and a pleasure to see old personal friends as you gather for a work session in the nation's capital. It is altogether appropriate, of course, that a member of the Supreme Court participate in the welcoming rites. You represent the legal profession in a great undertaking to restate the law; I am sure it has not escaped your attention that the institution of which I am a member is actively engaged in the same enterprise. [Laughter] The consideration that you show me on this occasion I take to be an example of the fine sportsmanship which should prevail among competitors. [Laughter]

I was told by your president that "too elaborate an address is unnecessary". Your president is a master of the art of dressing up his desire for brevity in the cloak of forbearance for the speaker. But I shall say a few of the things that are on my mind, in spite of the admonition.

Some of us who began attending these sessions close to a quarter of a century ago look back on those days with a certain nostalgia. Perhaps we were all a little naive; perhaps I was more naive than the others. But as I remember it now, what may be called the "climate of opinion" at those earlier gatherings was quite different than it is today. The labor on the Restatement of the law was commenced on the assumption that the body of private law as embodied in Court decisions was reasonably settled and fairly stable—at least, that most of it would hold good while the Restatement was being formulated. Of course, we knew that from time to time particular decisions would be overruled and that some rules of law would and ought to be changed by legislation. But we did not anticipate any fundamental change in the attitude of Courts to the law itself, or toward its development with traditional regard for its

continuity which is a characteristic of the common law method.

A System of Laws Dictated by "Ideological Theories"

A few days ago, however, Lord Macmillan, known pleasantly to many of us, in lecturing on "Law and Custom" at St. Andrews University, said something that may awaken a response in you. It was this:

> The lover of our ancient laws and institutions, which we have inherited from our fathers, cannot but look on with some dismay at the process which we see daily in operation around us whereby the customary common law of the land, which has served us so well in the past, is being more and more superseded by a system of laws which have no regard for the usages and customs of the people, but are dictated by "ideological theories".
>
> There will soon be little of the common law left either in England or in Scotland, and the statute-book and the vast volumes of statutory rules and orders will take its place. The work of our Courts is more and more concerned with the interpretation of often unintelligible legislation, and less and less concerned with the discussion and development of legal principles. Advocacy has consequently lost much of its intellectual interest and scope.

Impatience with Gradual Growth Under the Judicial Process

When I read that, I could not help but think of our own Mr. Justice Cardozo, whose reverence for the common law and common law methods was so poignantly expressed in his address at our third annual meeting almost twenty-five years ago. On that occasion he compared the common law to a magical coat described by one of Swift's characters—a coat which, it was said, would grow in the same proportions as the body of the wearer. Mr. Justice Cardozo said with some feeling that the common law had done just that—and that it was "still a good coat"—"far too good to be thrown away".

It is not easy from where I sit to judge whether Lord Macmillan's present fears or Judge Cardozo's earlier hopes represent current conditions in this country as a whole. The Supreme Court, except incidentally and not too successfully, was never an expounder of the common law. By *Erie Railroad* v. *Tompkins*, 304 U. S. 64, and related cases, and by its practice of declining to review State law questions in diversity cases, the Supreme Court has closed its own door to independent speculation as to common law principles. What, therefore, appears to me as a decline in the place of the common law in our scheme of things may be a Washington disturbance which does not reach State Courts or other federal Courts. But I suspect it is a part of a more or less world-wide impatience with the gradual and deliberate pace of growth under the judicial process.

The titanic struggle for power now being waged between nations and between classes within the nations is as much one to change legal systems as to change political or economic systems. This involves far more than changing rules of property to achieve greater socialization, far more than imposing a Continental system of judicial procedure, far more than setting up a secret political police force. It goes to the very nature of the Court itself and would alter the foundation on which our Western civilization has built its legal systems.

Communist Concept of the Role of Courts

The concept which dominates all Communist teaching has been stated by Soviet authority in these simple words: "The Court has been, and still remains, as it ought to be according to its nature—namely, one of the organs of governmental power, a weapon in the hands of the ruling class for the purpose of safeguarding its interests".

The most striking feature of this concept is its primitive mingling in the Court of the two functions that Western civilization years ago divided between the Courts and the legislature. This is not surprising, for it comes to us from a country whose legal institutions are at least 300 years behind the Western world in legal development and which has had little experience with representative legislatures. It comes from a people whom the Renaissance, the Reformation and the great democratic awakening that followed our own and the French Revolution, have never touched. Their history has no Magna Charta, no Bill of Rights. Their heroes include no Lord Chief Justice Coke to remind the Czar that he rules "under God and the law", no Jefferson, no Montesquieux. Lenin, Stalin and their compatriots stepped into a system of customary law deeply influenced by centuries of absolutism, and their view of the function of a Court, instead of being an advance over ours, is simply an adherence to an old authoritarian practice.

Legal System Based on Judicial Acceptance of Legislation

Of course, we democratic peoples recognize that the policy of the law is, and should be, made by what you may call a "ruling class". Under our own system, legislation is shaped by a majority of the representatives of majorities of electors in the various constituencies. Our concept of the Court presupposes its acceptance of decisions on policy by the legislative majorities that from time to time prevail, except where an overriding policy is set forth in the Constitution.

But when a ruling majority has put its commands in statutory form, we have considered that the interpretation of their fair meaning and their application to individual cases should be made by judges as independent of politics as humanly possible and not serving the interests of the class for whom, or a majority by whom, legislation is enacted.

The danger of the competition between our Western and the Eastern concept of Courts is that the latter is so much easier to apply. To carry out the Soviet conception requires a judge only to know which side he is on. But to observe the democratic separation of functions so as to leave policy making to the political bodies and make the function of interpretation a professional matter, requires training, constant intellectual effort, deliberation and detachment. And it is guided and aided by the experi-

ence of generations of common law judges found in the precedents.

Courts Owe Obligation of Fidelity to the Legislative Bodies

But as the Courts are obligated by the principles of our representative government to independence in construing the language of statutes, so they owe a similar obligation of fidelity to the legislative bodies in applying their policies. If the separation of functions is to be observed, it is necessary that the utmost clarity prevail in the communication of the legislative will as to policy. I read from time to time of laws enacted by Congress of which it is said it will require several years to learn how the Courts will apply them and what meaning Courts will give to them. Then, too, I occasionally learn of a statute that means one thing one year and another the next. This seems to be accepted as necessary and usual, but it really indicates that there is something wrong in the process by which law is communicated in this country. It will not do to blame all of this confusion on bad draftsmanship, appropriate as that criticism may be at times. It will not do to blame it all on the English language for its inexactness and lack of precision.

The unfortunate fact is that neither Congress in the choice of language it will use, nor the Courts in the meanings they will ascribe to Congress, have really effective guidance from consistently accepted principles of interpretation. Of course, a complete and automatic code of interpretation is not possible. But in its one hundred and fifty years of interpreting federal statutes, the Supreme Court has been less willing to commit itself to considered guides to interpretation than have many of the State Courts. Neither has Congress undertaken to formulate any comprehensive rules on this subject. For the individual justice to be left so much at large presents opportunity and temptation to adopt interpretations that fit his predilections as to what he would like the statute to mean if he were a legislator. Indeed, sometimes there is not much else to guide him.

ROBERT H. JACKSON

Problems Arising in the Judicial Interpretation of Statutes

The subject is too large and complicated for comprehensive treatment on this occasion. It involves inconsistent practices on such vexing problems as these: When will re-enactment of a statute carry adoption of previous administrative regulations or Court decision? When will consideration of a statute without changing it mean Congressional approval of prior judicial interpretation? Statutes that impose criminal and civil penalties or create liabilities, or all of these, are sometimes said to be construed strictly, sometimes liberally, and sometimes a middle course is taken. Should there be a prescribed, uniform approach to such statutes and, if so, what should it be?

What attitudes should be taken toward statutes that contravene common-law doctrine, in a federal system where there is no general federal common law? How far will we go to construe a law so as to avoid raising a constitutional question? How shall our construction differ in the case of what lately is called "humanitarian legislation" from other enactments, which by contrast must be regarded as "inhumanitarian"—the tax laws perhaps—and how shall we as judges distinguish the one from the other?

Resort to Legislative History Is of Dubious Help

I, like other opinion writers, have resorted not infrequently to legislative history as a guide to the meaning of statutes. I am coming to think it is a badly overdone practice, of dubious help to true interpretation and one which poses serious practical problems for a large part of the legal

profession. The British Courts, with their long accumulation of experience, consider Parliamentary proceedings too treacherous a ground for interpretation of statutes and refuse to go back of an Act itself to search for unenacted meanings. They thus follow Mr. Justice Holmes' statement, made, however, before he joined the Supreme Court, that "We do not inquire what the *legislature* meant, we ask only what the *statute* means".

And, after all, should a statute mean to a Court what was in the minds but not put into the words of men behind it, or should it mean what its language reasonably conveys to those who are expected to obey it?

The Constitution evidently intended Congress itself to reduce the conflicting and tentative views of its members to an agreed formula. It was expected to speak its will with considerable formality, after deliberation assured by three readings in each House. Its exact language requires executive approval, or enough support to override a veto. How far, then, should this formal text and context be qualified or amplified by expressions of one or several Congressmen in reports or debates which did not find place in the enactment itself?

There is a tendency to decrease the measure of the ambiguity which originally justified resort to legislative history. But even if the ambiguity is genuine and substantial, do we find more solid ground by going back of it? It is a poor cause that cannot find some plausible support in legislative history, which often includes tentative rather than final views of legislators or leaves misinterpretation unanswered lest more definite statements imperil the chance of passage.

A Formal Statute No Longer a Safe Guide for Lawyers' Advice

The custom of remaking statutes to fit their histories has gone so far that a formal Act, read three times and voted on by Congress and approved by the President, is no longer a safe basis on which a lawyer may advise his client, or a lower Court decide a case. This has very practical consequences to the profession. The lawyer must consult all of the committee reports on the bill, and on all its antecedents, and all that its supporters and opponents said in debate, and then predict what part of the conflicting views will likely appeal to a majority of the Court. Only the lawyers of the capital or the most prosperous offices in the large cities can have all the necessary legislative material available. The average law office cannot afford to collect, house and index all this material. Its use by the Court puts knowledge of the law practically out of reach of all except the Government and a few law offices.

Policy Controversies Which Generated the Act Are Brought into the Court

But perhaps the most unfortunate consequence of resort to legislative history is that it introduces the policy controversies that generated the Act into the deliberations of the Court itself.

There is no greater aid to law enforcement, and to the judicial process generally, than clear understanding of what the law requires. This, no doubt, is what led Mr. Justice Cardozo to describe your Restatement project as a "high enterprise". Confusion or conflict in comprehending the meaning of the law, while sometimes inevitable, should be reduced by every possible device. When Congress has in mind one thing, and its enactments are given different meanings in the Courts, it results in repealers and amendments, sometimes retroactive and in confusion, litigation and controversies that weaken and discredit not only the judicial process but the law in general, and government itself.

Yet, as matters stand today, I do not see how Congress can know, even roughly, the effect that will ultimately be given to any language it may use. And I do not see how the Bar can, with any large measure of confidence, advise clients in complicated business transactions what their liabilities or duties are.

Statement of Basic Principles of Statutory Construction Is Needed

Though it would not dispel all the doubts which are inherent in the situation, it would help give objectivity to the process of interpretation and assurance to drafting of statutes, if we could have general acceptance by the bench as well as the Bar of a few basic principles of statutory construction. Perhaps the Institute could devise a disinterested Restatement that would commend itself as an acceptable standard for enactment by Congress, or for application by the Courts.

Perhaps the situation requires an approach such as was adopted in devising the Federal Rules. Do not misunderstand me—I am not now naive enough to think that if any such course were agreed upon nothing would be left to what Mr. Justice Cardozo called those "tentative gropings, those cautious experiments, those provisional hypotheses, that are part of the judicial process". I know that such full agreement is beyond the power of even this distinguished group of lawyers. And I suspect that, even if that millennium did arrive, we judges would perhaps slowly, but ever so surely, demonstrate that either because of its legislative history or despite it, "millennium" in fact, or in judicial contemplation at least, means much less than a thousand years.

Nevertheless, the problem confronts judges, and particularly federal judges, every day; and it is worthy of any effort you might deem proper to make its eventual solution more likely and more immediate.

But I must not further offend against your president's injunction against an elaborate speech.

It is a fine thing that we have these meetings of our profession. Here we can haul each other over the coals and focus attention on trends of ill omen for the profession. And not least important is the fact that we can liquidate our conflicts and worries in social sessions. There, in those more mellow moments, we may continue discussion of this, or of less baffling subjects.

2

Federal Control of Insurance:

Moratorium Under Public Law 15 Expired July 1

by **Patrick A. McCarran** • United States Senator from Nevada

■ Under present conditions in this country, the insurance business is one that comes close to the lives and well-being of nearly all of the people, because it provides the means of security and protection for individuals and their dependents through personal thrift and savings without making that security a benefaction from government. It is also a business as to which State legislation, regulation and supervision have long been most active, expert, and generally adequate and effective. Perhaps for these reasons and the added reason that the vast invested reserves of the insurance companies constitute principal resources of the free enterprise system in many fields (such as private housing, railroads, public utilities, mortgage loans on business properties), the insurance business has been looked on invidiously by those who seek bureaucratic federal authority over large enterprises and their subordination to a controlled economy. The 1944 decision of the Supreme Court (322 U.S. 533) put the insurance business potentially under federal regulation. Public Law 15 of the 79th Congress was enacted to deal remedially with that threatened centralization.

July 1 of 1948 was thereby made an important date, because the Congress decreed that the moratorium which it set on the applicability of various federal laws should expire June 30 and that the latter would then apply to the extent that State laws and regulations had not covered the field. The *Journal* asked our good friend Senator McCarran, author of Public Law 15, to state for our readers the legal situation as it will exist after July 1. He has done so in the following article, which will be of interest to lawyers and their clients in every State. The whole history of the matter is a dramatic demonstration that State powers and regulations can be preserved against overweening federal centralization under the commerce clause, when the Congress is willing to exercise to that end its plenary powers along lines that interject federal action only if the States fail to adopt adequate measures to protect the public interest. We are honored by Senator McCarran's contribution to our columns.

■ Volumes have been spoken and written respecting the problems of the insurance industry since the decision of the Supreme Court on June 5, 1944, in the now famous *South-Eastern Underwriters* case (322 U.S. 533) that abandoned the doctrine of *Paul* v. *Virginia,* (8 Wall. 168) and held that insurance may constitute interstate commerce. Some of these problems are perhaps fanciful; others are quite real. Public Law 15 of the 79th Congress was the first step in dealing with this host of real problems.

By that law as amended and extended (15 USC §§ 1011-1015), Congress first adopted a policy declaration clause (§1011) and then provided (§1012) (a) that "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business"; and (b) that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: provided that after June 30, 1948" certain enumerated federal laws, among them being the Sherman Anti-Trust Act, the Clayton Act, the Robinson-Patman Anti-Discrimination Act, the Federal Trade Commission Act and the Merchant Marine Act of 1920, "shall be applicable to the business of insurance to the extent that such business is not regulated by State law".

Section 1013 of the same statute provided that, until June 30, 1948, the enumerated federal laws "shall not apply to the business of insurance or to acts in the conduct thereof". Section 1014 directs that nothing contained in the Act shall affect the application to the business of insurance of the National Labor Relations Act or the Fair Labor Standards Act of 1938.

Thus Public Law 15 not only did not prevent federal regulation of the insurance business in the future but, beginning July 1, 1948, it made a large class of federal legislation, notably the federal anti-trust laws, "applicable to the business of insurance to the extent that such business is not regulated by State law".

State Insurance Legislation Since Passage of Public Law 15

The events subsequent to the passage of Public Law 15 need not be recounted here in detail. But it will be well to take brief note of the situation as it stands today:

Thirty-five States, two Territories, and the District of Columbia, have enacted rate regulatory laws in 1947 and 1948, mostly along the line of the Commissioners' and All-Industry Committee recommendations, generally referred to as the National Association of Insurance Counsel bills. Fifteen of these State laws and those of the two Territories and the District of Columbia are closely patterned after the All-Industry NAIC bill. The other twenty follow the general pattern but with modifications. California's statute departs, probably more than do the new laws of many other States, from the NAIC pattern.

Legislation regulating insurance generally was passed by the States of Alabama, Maryland, North Carolina, Tennessee and Texas in 1945, and by Kentucky and Mississippi in 1946. Louisiana, New York and Virginia have had, for a number of years, legislation providing for regulation of insurance rates. Thus a total of forty-five States have acted affirmatively.

Shift of Emphasis of Public Law 15 Takes Place July 1

The above indicates the general coverage, by State law, of the field of rate regulation. Of course, there had been numerous Acts passed by the various States, generally referred to as fair trade practice measures, and also a number of laws for accident and health regulation. These statutes, now on the books, constitute the umbrella of State regulation with which the industry came to the date of June 30, when the so-called moratorium provisions of Public Law 15 expired.

The arrival of July 1, 1948, brings squarely within the field of federal law enforcement any practices by the industry which may be held violative of the enumerated federal Acts and are not regulated by the States. Public Law 15 did not go off the books on June 30. It merely shifted its emphasis. It is only the so-called moratorium provisions which expired.

States Are Invited by Congress To Deal with the Whole Field

In enacting this law, Congress held out an invitation to the States to deal affirmatively and effectively with those activities and practices of the insurance business which might otherwise be the subject of federal regulation. Until now, the emphasis by the industry, and by the States, has been laid upon those practices chiefly concerned with rate-making.

But there are other practices which, if inimical to the public interest, and if not regulated effectively by the States, will of necessity be regulated by one of the federal acts I have mentioned. Among these are the restrictive rules of associations of insurance companies or agents.

Where such practices are necessary to the proper functioning of a legitimate enterprise, and where the public interest is protected by proper regulation pursuant to affirmative State law, it would seem that the test of Public Law 15 has been met. If not, and the practice is a violation of one of the enumerated federal laws, the enforcement branch of the federal government has a duty to step in and take action.

Public Law 15 Operates First in the Sphere of Policy

In order to get the picture clearly in mind, it is necessary to understand that Public Law 15 of the 79th Congress operates in two spheres: the sphere of Congressional policy and the sphere of regulation.

In the sphere of Congressional policy, the Act made the declaration (§1011) that the continued regulation and taxation, by the several States, of the business of insurance, was in the public interest. But, while this declaration of Congressional policy was also a declaration of public policy, at least until overruled or modified by a subsequent Congress, the power of any subsequent Congress to change this policy could not be foreclosed. In recognition of this fact, the Congress also provided, *in the policy declaration clause*, that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States".

That provision is law, and the States are therefore free to regulate and tax the business of insurance; but only so long as Congress does not act affirmatively to withdraw that right from the States or to impose federal regulation.

What should be clearly understood is that Congress has not agreed to remain silent. It was the sense of the 79th Congress, and the writer believes it is the sense of the present Congress, that the States should be given every opportunity to regulate the business of insurance in their own way, and that so long as the States are making an honest effort at such regulation and appear to be protecting the public adequately, it is not likely that the Congress will wish to move into this field.

On the other hand, the business of insurance is one which touches closely the lives of the people. The Supreme Court has decided that insurance is interstate commerce. The Congress has therefore a duty to be vigilant in the public interest, to see that the business of insurance is conducted in a manner fully compatible with the public interest.

While it is not likely that Congress will move into the field of insurance regulation so long as the States are successfully regulating the business, we must recognize that silence on the part of the Congress depends primarily, not upon the extent or type of regulation imposed by the various States or by any State,

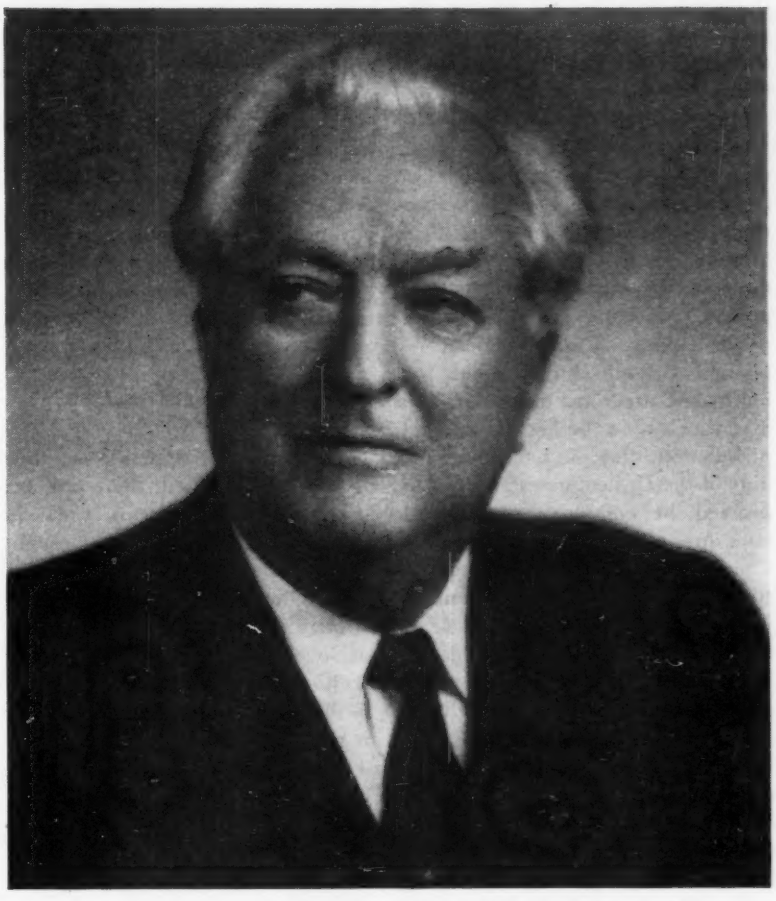
but rather upon the success of such regulation. That, in turn, will depend in large part upon the co-operation of the industry and upon the degree of self-regulation which the industry imposes.

Public Law 15 Operates Also In Sphere of Regulation

In the sphere of regulation, Public Law 15 had two major provisions. As amended and extended, it exempted the business of insurance, and acts in the conduct thereof, from the provisions of the anti-trust laws until July 1, 1948.

The Sherman Act and the Clayton Act have not, however, been wiped from the books. After June 30, they are, by the affirmative language of the Congress, to be "applicable to the business of insurance to the extent that such business is not regulated by State law".

Interpretation of this language must be in the light of the enforcement problem which is presented. It does not mean that all of the business of insurance in a particular State is exempt from the anti-trust laws if any particular proportion of such business is regulated by State law. If a State has enacted laws which regulate ninety per cent of the business of insurance in that State, the mere fact that the other ten per cent is not specifically dealt with by State law would probably be construed to mean that, for purposes of the enforcement of Federal anti-trust laws, that particular ten per cent will be considered as not regulated by State law, and that if that ten per cent includes any practices which are in violation of the federal anti-trust laws, such practices will be subject to prosecution.



PATRICK A. McCARRAN

The question of the applicability of the anti-trust laws can arise, and will arise, only when some particular practice is made the subject of complaint. The United States attorney to whom such complaint is made will then have to determine whether the particular practice complained of is regulated by State law. If State regulation has been imposed—if the State has taken effective jurisdiction of the particular practice in question—we can assume that the decision will be that the federal anti-trust laws do not apply.

It is not required that the assertion of State regulatory authority over a particular phase or practice of the insurance business shall provide the most effective regulation possible or that it shall be equally as strict as

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In the Senate he has consistently been a staunch and true friend of our Association, in that he has been open-minded and well-disposed toward its legislative proposals but has formed his own judgment about them and has supported them effectively when he believed them to be right. He was a co-author and co-sponsor of the Administrative Procedure Act of 1946. He has attended and addressed meetings of our Association; his address at Atlantic City in 1946 was especially authoritative ("Improving 'Administrative Justice': Hearings and Evidence; Scope of Judicial Review", 32 A.B.A.J. 827; December, 1946).

the applicable federal law in the same field. Congress has recognized the right of the States to apply their own public policy in the regulation of the business of insurance. The important thing is that the State, with respect to the particular field of insurance or sphere of insurance activity, or the particular practice in question, shall have asserted its authority and imposed its regulatory powers.

But if the particular practice complained of is one which the State has not by law attempted to regulate and over which the State has not asserted jurisdiction, then it would be the duty of the United States attorney to proceed to enforce the anti-trust laws applicable to such practice.

State regulation in such a field, to constitute an effective assertion of jurisdiction, probably would have to meet certain minimum standards. The State law should be explicit with respect to the practice which it is sought to regulate. Probably also the State law should be prohibitory rather than permissive. That is, it should prohibit the particular practice except in accordance with specified procedure and subject to State approval, rather than simply in terms permitting the practice in question.

Machinery should be provided for regulating the practice, and the law should designate an authority, in either some official or some agency of the State, to exercise the State regulatory power. It should lay down general standards to govern the discretion to be exercised by such authority. Probably it should also include provisions for public notice, and an opportunity for hearing, in advance of the exercise of such discretionary authority; and there should be some provision for appeal from the decisions made by such authority.

Summary of Situation at Expiration of the July 1 Deadline

To sum up: Now that the deadline of July 1 has passed, there will be, generally speaking, two ways in which federal power can be brought to bear upon the business of insurance. One of these ways would be through the enactment of new legislation by the Congress. This is not likely to occur unless the attention of the Congress is directed forcibly to what it may consider the failure of State regulation or enforcement. This might in fact be simply a failure of the industry to police itself, but the result would be the same. Congress is not bound by any specific rules. Its power to act is unlimited. It probably will not act further in this field, so long as it is satisfied the public interest is being served and protected; but any event, or series of events, which leads the Congress to the conclusion that the public interest requires regulation, will lead almost certainly to the imposition of such regulation. Whether Congress reasserts its jurisdiction over the field of insurance will depend, not upon the degree of State regulation, nor even upon the degree of good faith in State regulatory efforts, but upon the effectiveness of State regulation in protecting the public.

The second way in which federal power can impinge upon the business of insurance after July 1 is through enforcement of the federal anti-trust laws. In this field, broad generalities will not be considered. Furthermore, specific results will not be considered. There is no question of whether the public interest is or is not being served and protected. The sole question, with respect to any practice complained of, will be whether that practice is regulated by State law. If it is not so regulated, then that practice will be subject to the federal anti-trust laws, and it will be the duty of federal officials to enforce those laws. Thus, for purposes of enforcement of federal laws, the question is one strictly of legal construction. The inquiry will be: "Is this practice regulated by State law?"—not "Is it effectively regulated?" or "Is it wisely regulated?", but simply: "Is it regulated?"

Chairman Wiley of Senate Committee on Judiciary Commends Our Association's Assistance

■ Speaking before the Ohio State Bar Association at Toledo on May 14, Senator Alexander Wiley, Chairman of the United States Senate Committee on the Judiciary, again discussed "free judges for free people" and supported the point of view and proposals of his address before the Bar Association of St. Louis (34 A.B.A.J. 441; June, 1948). Giving particular consideration to steps which should be taken to insure highly competent, impartial and independent judges for the Courts of the United States, he said:

> One of the most important consequences of the new procedure adopted by the Senate Judiciary Committee is that, for the first time, the Executive branch of government, even *before* submitting its nominations to the Senate, has consulted with Bar groups. The Executive branch knows that the legislative branch will not countenance by-passing the Bar; and therefore the Executive branch has taken upon itself the responsibility of consulting initially with the Bar as to prospective appointments. I humbly feel, therefore, that the Judiciary Committee has given new vitality to the concept within the United States Constitution that Executive appointment shall be made with "the advice and consent of the Senate". . . .

3

"Consent of the Governed": Essentials of Freedom in Work and Life

by Murray T. Quigg • of the New York Bar (New York City)

■ A challenging and provocative discussion of the essentials of freedom in a modern society is contained in the following article, which seems to us to be worth careful reading and serious thought, although many of our readers will not agree with all of its pragmatic conclusions. At the start of his quest, Mr. Quigg questions the emphasis placed on "natural law", "inalienable rights", and similar concepts of a free society as contrasted with a totalitarian or "police" state; but he finds himself face to face with the compulsions exerted by governments, organizations or groups—by some men as to other men—and finds the only sanction for these in what will be recognized as in effect the developed consensus of fair play, the Roman mores, Lord Morley's "sense of the fitness of things", the expectations of men as to their freedoms and opportunities. Such a philosophy of course sounds the death-knell of arbitrary powers in public or private hands—government agencies, business combinations, labor organizations, "action committees", economic and pressure blocs, one-party controls in politics, and the like. Mr. Quigg's analysis of fundamentals which are too often overridden or lost sight of in present-day governments of free nations is worth thinking about in this tense and troubled hour.

Then I stripped them, scalp from skull,
and my hunting dogs fed full,
And their teeth I threaded neatly on a thong;
And I wiped my mouth and said, "It is well that they are dead,
For I know my work is right, and theirs was wrong."
But my Totem saw the shame; from his ridgepole shrine he came,
And he told me in a vision of the night,—
"There are ninety and sixty ways of constructing tribal lays,
And every single one of them is right!"
Kipling—*In the Neolithic Age.*

■ After reaching the end of a fifteen months' stint I picked up my unread issues of the JOURNAL. Going through them in quick succession, I was impressed with the constant reference to "natural rights" and "inalienable rights" and the outcropping of the perennial argument in support of these rights against the commands and permissions of society or those who wield its power. The contentions supported seem to me to overlook the essential factor in all law—that is, the behavior of J.S., that Hamlet of the legal and political drama whose periods of complacence and whose fits of fear and of courage, of despair and of hope, support alike the renown of men of outstanding virtue and men of unlimited iniquity.

The sanction of the law rests upon the beliefs, the emotions and the behavior of J. S., his friends and his relatives. According to the terms upon which they are satisfied to abide, the right of every man to speak his mind and the right of any man offended by a speaker to give him a haymaker, are on equal footing. The consensus bred of the beliefs and emotions of the members of any society is the foundation of their expectations and the law they write or accept. How men of good will and fair wisdom educate their beliefs and train their emotions, and how men of ill will corrupt both, how events alter their circumstances and confuse their beliefs, excite their emotions, and destroy the consensus, compose the data of history and afford us varying theories of law. But the law remains the record of what J.S., his friends and his relations expected, approved or accepted.

Ages Have Brought Little Change in Emotions and Purposes

No doubt each group of men living together in a collection of caves or upon some narrow strip of river bank thousands of years ago were all members of but one society. So far as we have knowledge of any laws by which their conduct was controlled, we know only that through a patriarch or a council of elders they enforced upon each individual the custom and usage which prevailed. In other words, so far as the group compelled

any man to conform, he was made to meet the common expectation which the usual behavior of individuals had led each of them to expect in the other. Why and how such a small and simple community set about establishing authority or submitting to authority in the hands of an individual or group we can only surmise. But the more we learn about our ancestors of ten or fifteen thousand years ago, the more we realize how little we are changed from them, if at all, in emotions and purposes. The change is only in our accumulation of knowledge, the variety of the things we have learned how to do and make, the devices with which we have complicated our affairs, the number of societies to which each of us belongs, and the means of richer self-expression which the arts and languages afford.

Today we are nearly all of us members of at least three or four distinct societies; the man of affairs, in proportion to his wealth and his conceit or both, may be a member of several hundred. A large part of the income of lawyers is derived from their work in organizing societies, incorporated or voluntary.

Besides formal societies, organized for an incalculable variety of purposes, there are purely informal societies which gather for a few hours or a few weeks and whose rules are not less exacting because they are not printed. I recall the very charming hostess of a summer camp. A guest arriving for the first time asked her where he might acquaint himself with the rules of the camp, to which she replied: "There are no rules, but if you break any of them you cannot come again." Throughout the years the little society over which this hostess presided changed its members gradually, but in any season most of them were those who had been its members in prior years. They were people who understood what was expected of them in their social contacts and they lived up to that expectation or they were not permitted to return. People maintain thousands of such societies today exactly as their ancestors did thousands of years ago.

Purposes and Activities of a Society Should Be Specific

When a lawyer forms a society in our dimly lighted age, he ascertains first what are the purposes of those who desire to form it, what activities it will pursue in support of those purposes, and then he considers what powers the society must be able to exercise over its members in order to promote the purposes and secure the results which are intended. He then draws an agreement providing for the exercise of those powers in the hands of specific persons to be from time to time chosen or to be chosen at regular intervals. If their powers are not sufficiently detailed, specified or understood, there is likely to be trouble. Those first chosen for the management, or a small group more particularly interested in its affairs, will use its resources for their own special aggrandizement. This may lead to the mere dropping away of the other members and the final drying up of the affairs of the association; or, in the case of a successful business corporation, it may lead to actions for an accounting and an appeal to the power of the state to establish by legislation the rights of the members more clearly and to fix the duties of the managers more specifically.

In any event, whether the society be incorporated or unincorporated, whether it be organized for profit or for purely social or eleemosynary purposes, there is a demand often supported by struggle, to insure that those who derive authority from the association of their fellowmen or the use of the resources of their fellow men, shall exercise that authority only in support of the purposes for which it is given, and that they will meet the expectations of those who gave it or suffer ouster.

Names for the powers exercised by the managers of any society over its members or the power of the society itself for the benefit of its members—corporate rights, social rights, sovereign rights—are a matter of pure convenience in classification. They are exercised invariably by human beings and on behalf of human beings and they derive their nature and their abuse from the inalienable character of human beings. In the long run, however, their exercise must meet with the expectations of those who are governed by them.

First Establishment of Authority Arose from an Emergency

No doubt the first establishment of authority in some individual over other members of the tribe, arose from an emergency, caused by an act of God or the threat of invasion. It was necessary to have a chief in time of war to post the guards and to determine who would act as fighters and who would bring up the supplies of arrows and stones and slings. He was alike general, procurement officer, and manpower commissioner. Either victory or defeat aroused new expectations and destroyed old ones and presented novel problems, particularly for the victor, in the distribution of spoil and the occupations of the conquered people as slaves.

The more dynamic and adventurous the people, the more frequent were the novel situations in which they found themselves, presenting a confusion of expectations and resulting in disorder among themselves. In such situations the man who can supply a quick decision which seems fair and reasonable to the men who are bearing arms, gains power and prestige and is more and more deferred to, even as in our day, in a moment of confusion, we defer, often in disregard of long-established principles, to the man of quick decision who seems most plausible in the eyes of those who carry the votes.

Growth of Political Societies Brought Authority to Leaders

As adventure followed adventure and political societies grew by conquest and spread out over wider and wider areas, the people became aware of the constant recurrence of issues for which the practice of common conduct afforded no rule. Acceptance of and faith in authority in the hands

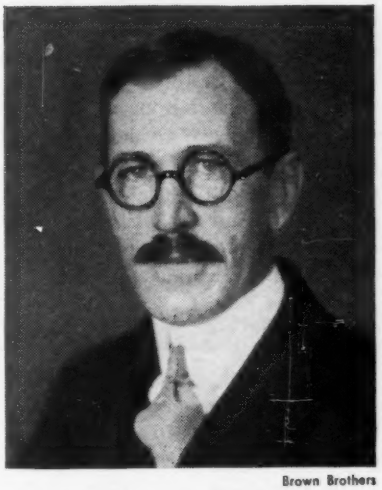
of a leader became an apparent, if not always a real, necessity. Moreover in a society of untutored minds, a man deemed wise in one matter was easily regarded as wise in all matters. Each leader became more and more removed from his people. He required many agents to carry his decisions and his commands to the people and to see that they were executed. As it was a long established custom for men to train their own sons in the arts and skills which they had, there being no schools to which they could go to learn other arts, the son generally followed the calling of his father. It seemed not unreasonable then that a great leader should train his son to exercise the same function which he exercised. Thus men setting up chieftains to meet an emergency found themselves in time the absolute subjects of dynasties. These dynasties ruled subject to the inertia of the ruled, restrained only by fear of reprisal or their own good sense. They had, however, the great advantage of being able to work into the minds of the people the notion of their grandeur and their wisdom, more particularly when the people were not able to be in daily contact with the monarch and perceive for themselves the personal inconsequence and folly of their kings. The legend of divinity with which those who have greatness thrust upon them are wont to clothe themselves added a luster agreeable to both ruler and ruled.

Under these circumstances of complete surrender of political function to a monarch, what right was violated by any edict of the king? What was it that any subject had that he could not give to the king and that the king had no right to take? What belief or expectation suggested that hope lay in any other rule than that of a good and wise man as king? Obviously it was not freedom of the press. Perhaps it was freedom of speech or freedom of worship. But if appreciation of such freedoms was not sufficiently understood and widely enough held to instill them into the prevailing thought of the society, and to impose them as limitations upon the power of the king, the idea that these rights are natural or inalienable would seem to be an afterthought.

Of course, the kings exercised powers which a great number of their subjects sooner or later did regard as arbitrary and as a result the kings sometimes had to pay for their powers with life. The ancients quarreled over who was fit to rule and shifted the rule from monarch to oligarchs, to aristocracies and to majorities. But whoever did rule exercised all power as a matter of right, subject only to the fear of revolt and his or their own good sense. Even the fine sense of worth of the individual and the protection of his dignity by law during the Roman Republic did not rise above the authority of the Roman Senate.

Anglo-Saxon Kings Rendered Judgments in Open Court

The Anglo-Saxons, in their small kingdoms in England, enforced a customary law upon their kings by requiring them to render judgment only in open court after hearing the advice of the elders. The Witenagemot was an effective institution to restrain arbitrary power and to hold the members of society, including the leaders, within the bounds of expectation. When, however, William,



Brown Brothers

MURRAY T. QUIGG

Duke of Normandy, imposed the feudal order in England, he set himself up as the only man in England having rights. Others had merely customary privileges and burdens according to rank. When John, by curtailing privileges and increasing burdens, exasperated his barons, the customary procedure would have been to cut off his head. But here the barons did a novel thing. They said, in effect:

> This old rascal will do as well as any other, but we will make him agree that what have heretofore been matters of shifting privilege and burden shall hereafter be matters of specific right and duty,—and here is the essence of the matter for all succeeding generations,—and *these shall not hereafter be altered without notice, debate and consensus.*

Then in succeeding parliaments during one hundred and fifty years with the barons alone, and thereafter with the Commons, the people of England built up the power of their executive for the performance of those tasks which they wished him

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Concerning the Author: Murray T. Quigg, member of our Association since 1922, received his A.B. degree from Harvard College in 1913 and his law degree from the Law School of Columbia University in 1916. Admitted to the New York Bar in 1916, he served as editor of *Law and Labor*, published by the League for Industrial Rights from 1919 to 1934. Since that time he has been in general practice in New York City. He has devoted a large part of his time to the study of the legal aspects of labor relations and the problem of individual freedom of the worker in a highly organized industrial order comparable to the freedom of the citizen in the political order. He is a speaker and writer on the subject of industrial freedom. He is a member of our Association's Section of Labor Relations Law.

to undertake, while at the same time stripping him and his ministers of all powers which they deemed arbitrary. It is the barons at Runnymede to whom we are indebted for showing us how to make the law an expression of our expectations while providing sound authority adequate to meet the exigencies and the changes of a dynamic society.

The Essence of Anglo-Saxon Liberalism

The process of distinguishing arbitrary from functional power and forbidding the one while supporting the other, is the essence of Anglo-Saxon liberalism. The rights of the citizen today rest not upon any natural law or any quality of inalienability, but upon the pre-eminent idea that those who administer an organized social interest shall not exercise any constraint upon those in whose behalf they act which a literate people do not recognize as necessary for the performance of the function for which the organization exists. Thus, when the American colonies set about drafting their State Constitutions, they distributed power among the administrators of their governments and specified limitations upon their powers, and required that these administrators be chosen by the people at frequent and regular intervals. When the founders of the federal government wrote the Constitution of the United States they specified the powers to be exercised by the United States, enumerating those that they believed necessary to the maintenance of such a federal government as they desired, forbidding the exercise of certain powers, declaring that those that were granted should be exercised in accordance with the principles of due process of law, and reserved all other powers to the States or to the people respectively.

To establish religious liberty as a matter of right and not of mere tolerance, they merely withdrew from every priesthood the power to compel any person to worship at the altar of its choosing, and then left each priesthood free to perform its functions as its communicants should direct or by acquiescence approve. They cut off all arbitrary power and left the functional power unimpaired.

Arbitrary Power Distinguished from Functional Power

We shall have a free industrial order comparable with our free political and religious orders when, instead of directing industry or laying down specifications for industrial behavior, we distinguish arbitrary from functional power in the hands of those who administer the growing industrial order and forbid the one while supporting the other.

We organized industry to exploit mechanical power in order that we may have with less labor a greater supply of the necessities and comforts of life than we otherwise could. Mechanical power has been so efficient in providing the support of life that life, true to the law of Malthus, has crowded upon its opportunity. Whereas prior to the industrial revolution the society whose members increased by five or ten per cent in a century was fortunate, the population of Europe increased approximately one and one-half fold from the close of the Napoleonic Wars to the beginning of World War I, and the population of the United States has doubled within the lives of men who are but three score years of age.

"Big Business" Is a Necessity

"Big Business" is not a threat—it is a necessity. Our population could no longer be sustained without it. But the task of producing and distributing the necessities of life does not justify the interference with any man in the sale or purchase of labor or the practice of a lawful trade. Indeed, such interference can only curtail the energies of the people, restrict the flow of goods to the market, and discourage the achievements of talent and genius.

Today the managers of employers, of trade unions, of finance, of merchandising and the government itself, are all engaged in practices which interfere with the freedom of the market in the sale of labor and the risk of labor. Work is not only a means of livelihood—it is a way of life. Certainly a man's right to work and to offer his services or the fruit of his services is as valuable and important to him as the right to speak his mind or to worship at the altar of his own choosing. It is just as important as any right that has ever been deemed to be inalienable, but its protection does not rest upon any afterthought concerning its inalienability. It must rest upon the conception of a literate people that those who exercise the administration of a social function do not thereby receive any authority to behave in an arbitrary manner. There is no right of society existing independently of the function for which men maintain an organization to secure order in society and protect their expectations. The exercise of power in excess of that required to perform the function is tyranny, however concealed by the habiliments of law.

The social organization—be it a summer camp, community, a corporation, the Church, organized industry, or the state—exists, each for a purpose dictated by the beliefs and emotions of those who support it. The consensus of their expectations is the final authority.

The essential question of the law is not what rights are inalienable or what burdens the people must bear in the name of the state. The essential question is: *By what sanction may any man, or men, compel any other man or men, to do or refrain from doing, anything?*

4

Collective Bargaining:

Lawyers' Role in Negotiations and Arbitrations

by **W. Willard Wirtz** • Professor of Law, Northwestern University School of Law

■ An increasing number of practicing lawyers are finding that they are called on by their clients from time to time for the negotiating or drafting of collective bargaining contracts, for interpreting provisions of such contracts, for advising as to the merits or disposition of grievances, and for trying arbitration proceedings as to labor disputes or wage demands by unions. A recent analysis of a large number of labor arbitration cases showed that where the parties had been represented by counsel in 84 per cent of the cases in 1942, the percentage had gone up to 91.6 in 1947 (34 A.B.A.J. 305; April, 1948), this figure being significantly above the 82 per cent shown for commercial arbitrations. Accordingly our readers should find instructive the following article in which both a philosophy of such matters and an abundance of practical suggestions to participating lawyers are given by a law professor who has heard many labor disputes and controversies, as a member of federal agencies and contract arbitration boards.

Professor Wirtz makes first an impressive showing of the extent to which these contracts and the arbitration proceedings under them have created a domain of "law" and "adjudication" by private agreement which in effect takes the place of traditional law, the role of the Courts, and even the functions of legislation. To many lawyers this is a disturbing trend because they regard it as ordinarily excluding representation of the public interest and as having been brought about so largely by government and politics, the use of governmental powers in behalf of economic minorities combined into "pressure groups". Nevertheless, the modern mechanisms dealt with by Professor Wirtz are in widespread operation; lawyers have a rightful and most useful place in them; usually or often, as Professor Wirtz recognizes, the lawyers are less "legalistic" and technical than their clients would be "on their own"; and every lawyer can profitably ponder and form his own opinions about Professor Wirtz's point of view and pragmatic suggestions from his experience. He is chairman of an important Committee in our Association's Section of Labor Relations Law, under John M. Niehaus as 1947-48 Section Chairman; and the present article is in part a reflection of work done in the Section. The *Journal* is pleased to publish the present article, in pursuance of its policy of acquainting its readers with differing views in important fields of law. With this may well be read also Murray T. Quigg's "Consent of the Governed", elsewhere in this issue.

■ There are today approximately 50,000 collective bargaining agreements in effect between employers and labor unions in this country. These agreements are actually codes of private law which provide a basis for the government of 50,000 plant communities and are in many ways just as important to the citizens of those communities as are the State and federal laws to which they are also subject.

Collective bargaining is the "preventive" phase of labor law, designed to stabilize the economically vital employment relationship and to supply an alternative to the old and wasteful methods of settling at least some labor disputes. The purpose of these agreements is the purpose of law, and their subject matter and form are typically "legal". The "seniority" clauses control interests which are closely akin to property rights. The "checkoff" clauses provide in effect for tax systems to support a part of the community governments, and some of these systems are expanded to encompass private social security programs. Virtually all of these agreements set up, in the grievance and arbitration provisions, private judicial processes for the handling of disputes which may arise during the contract term. These "contracts" are in effect legislative

enactments which contemplate, for their administration, the exercise of executive and judicial functions.

There have emerged, along this twentieth-century frontier of legal development, some interesting and significant questions as to the competence of the legal profession to effectuate the purposes of law when the demand for it arises in new and somewhat unfamiliar forms. The view is frequently expressed, by union and management officials alike, that "lawyers always hurt labor relations more than they help; they just aren't qualified by nature for our kind of problem". There is some feeling that lawyers have developed such a deep affection for the *status quo*, for the certainty of precedent, and for the formalism of the courtroom, that they have become by nature disqualified from participation in this new type of industrial government.

It would be pointless even to attempt, on paper, to answer these charges. It is enough to note that it is only within the past four or five or at most ten or twelve years, that most of these 50,000 communities have decided to go onto a law basis, and that substantial blocs of the citizenry lack completely any realization of what is involved in replacing economic and physical force with law. It is very probably no more true that lawyers do not understand labor relations than it is the parties to these relationships do not understand that the price of substituting even their own law for economic force is the necessary assumption of sometimes burdensome obligations and chafing administrative responsibilities. Thousands of lawyers are in fact participating today in the negotiation and administration of these collective bargaining "ordinances". The degree of their participation is in itself a partial answer to the expression of adverse opinion which has been noted. More importantly, the experience which has now accumulated offers a basis for some identification of the principal difficulties which lawyers have experienced in adapting their traditional thinking and professional techniques to the new demands of this collective bargaining process. A little introspective analysis of these difficulties will perhaps permit a better basis for evaluating what criticism there has been.

Agreements Which Are More Than Orthodox Contracts

Our first and probably most basic difficulty has been in appreciating the differences between collective bargaining agreements and ordinary commercial contracts. The fact that they are called "contracts" has led us to try to fit them into the familiar molds of Willistonian concepts. The result, in England and Canada, has been that the Courts, finding more duress than consideration in the origin of these "agreements", have refused to enforce them. Our own Courts have fortunately taken a more flexible approach. After several decades of vain attempt to fit these square pegs into the familiar round holes of the "usage" and "agency" and "third party beneficiary" theories, the American Courts have concluded that these are not ordinary contracts at all, being rather in the nature of "treaties" or "tariff schedules". This makes them, of course, no less enforceable than if they were orthodox "contracts". The nature of these "laws by agreement" is still more exactly reflected in the language of the agreements themselves, wherein the parties refer to them as representing an exercise of the "legislative function".

For practical purposes, the biggest difference between collective bargaining agreements and ordinary commercial contracts is that these agreements *cover only a part of the relationship between the parties to them.* A buyer and a seller, or a licensor and a licensee, are bound together only as the terms of their agreement bind them. Yet no collective bargaining agreement even purports to cover everything that is important to the employment relationship. The employees can be just as much affected by management's action with respect to matters left within its discretion (e.g., production schedules) as by the application of the "seniority" clause. The basically important issue of productive effort is rarely covered, except indirectly, in the terms of these agreements.

Lawyers participating in the drafting of these agreements have undoubtedly erred in trying to draw them with blue-print definitiveness and detail. It is impossible to anticipate all of the questions which will arise during the contract term, and the complex phraseology which has resulted from attempts to do so has frequently led to misunderstanding and to more disputes than there would otherwise have been. These plant codes, like other "legislation", must contemplate the exercise of "executive" discretion in their application to specific cases.

This executive function, carried on in the day-to-day operations of the plant and particularly at the regular meetings of management and union committees, is exercised very largely without the participation of lawyers. There is reason to believe, from the record of cases which are eventually taken to arbitration, that this executive function is handled perhaps even more legalistically than if lawyers were involved. A layman rarely reads a legal document as a whole. Not understanding all of it, he will seize upon a clause or a phrase that seems to him to support his interest and will reject the idea that his point is affected by anything else in the document or in the broader relationship. The terms of the agreement become masters rather than servants. The union will insist upon a literal construction of the seniority clause even though the result will be not only serious interference with production but also more injury to the bumped employee than advantage to the bumper. The industrial engineering department will seize upon a contract reference to a time study or job evaluation system as grounds for attempting to reduce rate-setting to a completely mechanical stop-watch and slide-rule basis. The labor relations manager will refuse to even consider a union

demand because it is not technically a "grievance" within the contract definition, even though the result may be that an irritation which could have been easily removed is allowed to fester unnecessarily.

It is essential to the purpose of these agreements that they be honored. Their purpose is defeated, however, when they result in the introduction of brittleness into a relationship which must necessarily be kept flexible and resilient. Lawyers, although not primarily responsible for the mistakes which have been made at this executive stage of the industrial government process, have probably done too little counselling as to the dangers of substituting concepts of "contract rights" for those of "plant interests". It is hard to understand why we have in fact gone out of our way to discourage, in Section 8(d) of the 1947 version of NLRA, the orthodox procedure of amending these agreements if the need for amendment arises during the contract term.

The "Collective" Feature and Group Consciousness Should Not Be Ignored

Another distinguishing feature of these "collective" bargaining agreements is suggested by the phrase which describes them. One of the parties is always a *group*. The implications of this factor have been lost by those lawyers who have simply analogized groups of employees to groups of shareholders. This gives unions, like corporations, significance only as "legal fictions", as "entities" created to serve the purpose of law, and as "veils" which are to be respected or pierced as occasion warrants. Professor Elton Mayo's reports on the now famous Hawthorne Experiment illustrate the error of any such analysis. Unions have emerged as grass-root expressions of a powerful group consciousness, and are rather creators than creatures of law. They are community organizations possessing their own mores and their own strength.

Where lawyer draftsmen of collective bargaining agreements have ignored this group consciousness and these mores they have contributed to misunderstanding. An astonishing amount of unnecessary resentment springs from a careless contract reference to "the company's employees". A needless mistake is made in every use of a Latin phrase, a "whereas" or a "hereinbefore", or a brace of redundant synonyms. In a community where high value is placed on plain speaking, these are affectations and, as such, seeds of suspicion. Men unfamiliar with the rule that preambles have no binding legal effect may be expected to misinterpret grandiloquent surplusage which seems to assure some consideration which has not been forthcoming. The writing of the laws for a community of working men is a different art from the drafting of patent licensing agreements which will be read only by other lawyers.

The "no-strike" clauses which are contained in most of these agreements are beginning to reflect an awareness of the potential uses of the union organization for the purposes of community government as well as community warfare. Most unions are entirely willing to agree to undertake the policing of wildcat strikes, and many of them have been effective in discharging this responsibility. More and more managements are turning such problems as petty thievery over to the unions. The handling of grievances presents, of course, the most obvious questions involving the recognition of the union as any agency of plant government. With respect to these and many other matters it is essential that the lawyer participating in the drafting and administration of these agreements recognize that one of the parties is an organization rather than an individual.

Harris & Ewing

W. WILLARD WIRTZ

Concerning the Author: W. Willard Wirtz was born at DeKalb, Illinois, in 1912, and was educated at the University of California, Beloit College, and the Harvard Law School. He taught at the University of Iowa in 1937-39, and then came to the Northwestern University School of Law, where he has since been, aside from absences in United States Government service. In 1942-43 he was Assistant General Counsel for the Board of Economic Warfare. Later he was chairman of the Kansas City Regional Office of the War Labor Board, general counsel and afterwards a public member of the National War Labor Board, and chairman of the National Wage Stabilization Board in 1946. This year he was a member of the Presidential Emergency Board which heard the nation-wide railroad case and made a fact-finding report and recommendation to the President.

He is a member of the National Academy of Arbitrators and the American Arbitration Association, and is presently serving as "impartial umpire" for the United States Rubber Company and the CIO union representing its employees. He has also served as arbitrator between other employers and unions.

He became a member of our Association in 1941 and of its Section of Labor Relations Law upon its creation in 1946, and is serving his second year as chairman of the Section's Committee on the Improvement of the Administration of Collective Bargaining Contracts. His present article is based on his experience and is prepared in part from his work in the Section.

Arbitrations Make New Demands on the Lawyer-Advocate

It is with respect to the handling of arbitration cases that the role of the lawyer is perhaps most important in connection with the collective bargaining administrative process. Here a stranger to the relationship (except where there is a permanent "umpire") has been called in by the parties to settle a dispute as to the meaning or application of their contract. There is an art to "telling the story" to a stranger, and the lawyer's training and experience should qualify him particularly for this job. He is something of a stranger himself and will know, better than those who are too close to the problems involved, what and how much this other outsider has to be told to make these problems meaningful. The arbitrator is himself very likely to be a member of the Bar. Lawyers claim no mononoly on the arts of persuasion but most of them have had quite a lot of practice at it. Arbitration is, furthermore, a matter of relatively strict contract construction. Here it is (perhaps unfortunately) the "rights" of the parties rather than their interests which must be determined. The issues involved are of the type with which lawyers are generally familiar in their capacity as advocates.

There is, however, one basic element in the arbitration situation which requires a major adjustment in the courtroom lawyer's thinking about the principles and techniques of advocacy. In these cases, unlike those which are settled in Court, *the relationship between the parties involved is a necessarily continuing one and it is going to go on after the case itself is over.*

The parties to Court litigation have usually terminated their relationship. A wife rarely sues her husband, or one partner another, unless the decision has been made that things are just too bad to make a go of a joint endeavor. All that remains to be done is to decide who gets how much out of the wreckage. That issue is normally decided, if the matter goes to adjudication, by a process of half-truths, colored facts, distorted precedents and character assassination which rarely has the effect of improving the feeling between the former associates. Each lawyer-advocate shares with his client a single-minded purpose to "win the case"; and the cost of winning, in terms of future feelings, is just not in the picture.

The Possibility of Arbitration Victories That Are Too Expensive

In the normal arbitration case, on the other hand, the price of a favorable decision may, if the proceedings are thoughtlessly handled by the advocates, greatly exceed that of an outright loss of the case. Suppose, for example, that an employee's claim for reclassification from a 97-cent to a $1.02 job rate is met by an overpowering wave of argument that his work is "something anyone could do", that he has done it very poorly, that he is a small man physically, that he takes a lot of sick leave, that when he is away a janitor takes over his duties, and that in any event it "has always been recognized as a prerogative of management to say what one of its employees is worth". For good measure, the company lawyer cites ten or fifteen cases "from *Corpus Juris*".

Assume that the arbitrator's decision in this case is for the company. The company lawyer wins his case. Does the company? It wins the right to go on paying 97 cents an hour to a man whose pride in his work has been completely destroyed and who is therefore worth now perhaps 50 cents a day. Furthermore, even if it be assumed that this one employee was expendable, the industrial relations manager knows that the lawyer's entire argument at the hearing is going to be reported back to the union membership, and that everything he said will be identified with the management officials themselves. The reports will lose nothing in the re-telling. It will be "the company" which "says it's none of our business what we're paid", which "is looking in a lot of law books for what we meant in the contract", and which "won't give Jones a raise because he's little and the war malaria burned him out". The winning of that one 5-cent case may cost all the gain of months of careful handling by the industrial relations manager of what is a perhaps unjustifiably delicate set of sensibilities.

Company counsel are not alone in their occasional lapses into short-sighted advocacy which places the winning of a particular case above the health of the relationship. The records are filling up with cases in which the union lawyer or international representative won his case by insisting upon a literal construction of a contract clause which had unquestionably assumed the continuation of some previously established, though unwritten, understanding. What the records do not show is the extent to which these pyrrhic victories resulted in a general tightening up on the part of the company which subsequently cost the local unions a hundred times what they won in the particular cases.

The Application of Rules of Evidence in Arbitration Hearings

Much has been said and written about the applicability to arbitration proceedings of the "rules of evidence". These rules, having as their purpose the insurance of a decision based on trustworthy evidence, are obviously relevant to the holding of these, just as any other, adjudicative hearings. It is professional arrogance, however, to suggest that courtroom rules be applied in arbitration proceedings without recognizing the different circumstances and purposes of the two forums.

These rules have, in the first place, become encrusted with a formalism which is not essential to their purpose and against which laymen will very naturally rebel. There is no reason why the sound principles which they incorporate should not be effectuated without recourse to the trade-marked labels which identify them in the courtroom. The unreliability of an argument built on an alleged oral understanding can be easily enough pointed out without

reference to a "parole evidence" rule. Everybody present at a hearing will get the point if it is suggested that a witness is relying on "a second hand report", whereas only antagonism will result from any reference to "hearsay". Good sense underlies many of the rules regarding burden of proof and presumptions, but good sense also dictates that counsel in arbitration hearings invoke these principles in plain and understandable English instead of by resort to courtroom abracadabra. A layman's ignorance of the law's language is ample excuse.

Consideration of the question of "relevancy" illustrates another aspect of the importance of handling arbitration advocacy with due regard to the continuing relationship as well as to the winning of the immediate case. It may be anticipated, in almost any arbitration in which the union relies on testimony of employees from the shop, that some of this testimony will in fact be completely and totally unrelated to the question of contract construction presented. Yet only the most short-sighted of company counsel would urge that the arbitrator exclude such testimony, unless, of course, the witness is only trying to improve what he seems to consider an appropriate occasion for "telling off the boss". Those familiar with plant relationships accept the prophylactic value of letting an employee who honestly feels he has been aggrieved get the load off his chest. A ruling that an employee cannot tell the arbitrator something he sincerely considers very important to *his* case will only sour him on the whole proceeding. He does not realize how narrow the arbitrator's jurisdiction really is, and no amount of patient explanation would convince him.

The point is not that employee-witnesses should be mollycoddled even at the expense of misleading an arbitrator. The point is that this whole issue can be avoided by making one slight adjustment in the courtroom conception of the rules of evidence. They have traditionally been applied as rules governing the admissibility of evidence. They should be modified, for these arbitration proceedings, into rules for the *weighing* of evidence. Counsel always has adequate opportunity to explain fully to the arbitrator why he feels that anything that has been said is beside the point. A lawyer observing the six weeks' hearings before the Emergency Board in the 1948 railroad case could not but be impressed by the fact that the skilled lawyers who represented the parties there never once found it necessary or advisable to object to any part of the 5000 pages of testimony which were presented. If something which had been said seemed to be beside the point or not reliable, opposing counsel simply said so and let it go at that. If an arbitrator cannot be relied upon to weigh properly what he hears, it will be unlikely that his deficiency will be such that it can be neutralized by a careful sifting of what he is allowed to listen to.

The Quicksand of Technicality in Arbitration Proceedings

Similar considerations affect the question of reliance upon technical defenses which present themselves in the course of arbitration proceedings. The lawyer representing the union is likely to seize upon the fact that the company failed to give the requisite written notice of a change in a piece-rate, having relied instead on the foreman's oral advice to the operator involved. Or company counsel will insist that a grievance is groundless insofar as the contract provision cited in the grievance form is concerned and will protest vigorously the arbitrator's consideration of another contract clause cited for the first time by the union at the hearing. The arbitrator may feel that he has no choice but to accept these well-grounded technical claims. If he does, a lawyer wins his case—but the determination of the basic point in issue is only postponed until another arbitration hearing (probably before a different arbitrator) can be arranged.

It may even be seriously questioned whether the basic approach of the adversary system of advocacy—the trial by half-truths—does not place too much strain on a continuing relationship. It is all right, in Court litigation, for first one advocate and then the other to present a skillfully devised assortment of carefully selected facts and precedents and to leave it then to the judge to find his way between a Scylla and Charybdis of fractional verities. The two advocates are probably pretty well matched in this art; they speak the same language as does the judge; and the only consequence of his being in fact deceived is that the spoils may be unfairly divided.

None of this protection is present in arbitration proceedings. The advocates are usually not well matched, and the arbitrator frequently knows much less about the subject matter than does anyone else in the room. Worst of all is the fact that if he errs in this weighing of fact and fiction, the parties are going to have to live together with his error. If the mistake is serious enough, it may well start a chain reaction of disputes which are the product only of the arbitrator's misunderstanding. Giving an arbitrator a distorted account involves a risk which need not be calculated in ordinary liquidation litigation.

The Value of a Different Approach in Labor Arbitrations

What has been said here involves no naive disregard of the occasional essentiality of winning a particular case. It is not without a measure of justification that management views each union grievance victory as encouragement for the filing of more grievances. There are undoubtedly cases in which a union considers a particular point essential to the maintenance of proper plant relationships or as a safeguard against company domination.

The point is not, however, that grievance cases should not be won. It is only the obvious point that there are different ways of winning cases. Beyond that it is the point that here, unlike the situation in

most other types of litigation, the expense of winning a case must be considered in terms of what effect the method of advocacy will have on the future plant relationship. More simply, the point is that there is a difference between the proper handling of the situation when a fender is bruised (1) by the parking lot attendant, and (2) by your wife (or husband).

Collective bargaining is a process intended to serve the purpose of law in the social and economic order. There is no basic reason why the professional services of lawyers should not be of just as great value in the legislative and adjudicative aspects of this particular legal process as in any other. The full effectuation of their potential value in this area awaits only recognition of the necessity of adapting certain traditional techniques and modes of thinking to a new set of circumstances and demands.

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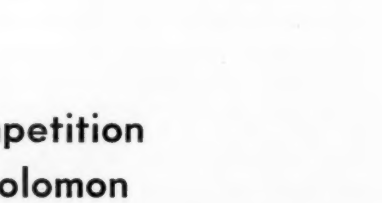
1948 Ross Essay Competition Is Won by Frederic Solomon

■ Frederic Solomon, Assistant General Counsel of the Federal Reserve Board in Washington, a member of our Association for ten years, has been awarded our Association's 1948 Ross Essay Prize, made possible by the testamentary benefaction of the late Judge Erskine M. Ross of California (33 A.B.A.J. 1173; December, 1947). An "honorable mention" award, made in 1948 as last year, went to Donald Kepner, who will be an assistant professor of law at the University of Louisville during 1948-49. Both are members of the Georgia Bar, Solomon having been born in Georgia, and both have practiced law in Atlanta, although neither is now a resident of Georgia.



Fabian Bachrach
FREDERIC SOLOMON

Elliott's
DONALD KEPNER

The Committee which read the essays and recommended the award of the prize, this year amounting to $2500, consisted of United States Circuit Judge Alfred P. Murrah, of Oklahoma and the Tenth Circuit, Chairman; Harold C. Havighurst, Dean of the Law School of Northwestern University; and Alfred J. Schweppe, of the Washington State Bar. The topic for this year's competition was "What Steps Should Be Taken by the National and State Governments To Preserve the American Federal System and Restore Powers and Responsibilities to the State and Local Governments?"

The winning essay is published elsewhere in this issue; the honorable mention" essay will be published as soon as space permits. Both are regarded as notable contributions to the public discussion of the important subject.

The winner of this year's prize was born in Fort Valley, Georgia, on August 1, 1911, attended local schools, and was graduated as valedictorian of the Fort Valley High School in 1928. In 1933, after five years at the University of Georgia, he was graduated with both a B.S. and LL.B. degree, and was valedictorian of the academic class and first honor graduate of the law class. During his undergraduate days, he edited the university annual and represented the university in numerous debates, including some with Oxford University, of England. He was elected to Phi Beta Kappa and to Sphinx, highest non-academic honorary. In 1941 he was graduated from the Graduate School of Banking of Rutgers University, in New Jersey.

He was admitted to the Georgia Bar in 1933 and later to the Bar of the United States Supreme Court. He practiced law in Atlanta, and in 1934 entered the legal division of the Board of Governors of the Federal Reserve System, in Washington, D.C. He became a member of our Association in 1938.

Soon after Pearl Harbor Mr. Solomon left the Federal Reserve Board to enter the United States Marine Corps as a first lieutenant, and later received promotions to the

rank of major. In addition to receiving tactical training, he was trained in electronics and radar at Harvard and the Massachusetts Institute of Technology. Overseas in the South Pacific he directed the use of radar and aircraft to intercept and destroy enemy air attacks on the Russell Islands and at Guadalcanal. Later he commanded a Marine Air Warning Group at San Diego that trained Marine Squadrons for similar overseas duty.

After his release from Marine Corps active duty in December of 1945, he returned to the Federal Reserve Board. As Assistant General Counsel his responsibilities relate particularly to the legal phases of administrative procedure, stock market credit, international financial matters, and the drafting of legislative recommendations.

In our Association he is a member of the Section of Corporation, Banking and Mercantile Law and the Section of Taxation. In the latter he is now serving on its Committee on Federal Excise and Miscellaneous Taxes and its Committee on Federal Income Taxes.

Mr. Kepner, who received "honorable mention" for his essay, was born in Chicago on April 26, 1916. He received his elementary and secondary education in the schools of Salem, Illinois, and was graduated from the University of Illinois with the B.S. degree in 1937. He was graduated from the Lamar School of Law of Emory University, in Atlanta, Georgia, with a J.D. degree in 1946, and is now working on a J.S.D. degree at New York University School of Law. During 1947-48 he has been a teaching fellow at the latter institution, and he will become an assistant professor of law at the University of Louisville this fall. From January to August in 1947 he was an instructor in law at the Lamar School of Law at Emory.

From 1937 to 1943 he was employed in administrative capacities by various business firms in Atlanta, and in 1944 became the law clerk for the Atlanta Judicial Circuit (Georgia). In 1945-46 he was price and administrative analyst for the Atlanta Regional Office of the OPA.

He was admitted to the Georgia Bar in 1946. He became a member of our Association last year, and is a member also of the Georgia Bar Association and the Atlanta Bar Association.

Richard D. Cudahy Receives Our Association's Prize for Highest Standing in Law Course at West Point

■ Richard Dickson Cudahy, a member of the 1948 graduating class of the United States Military Academy, has been awarded the American Bar Association prize given yearly to the cadet standing first in his class in the law course at West Point. The award, given for the purpose of encouraging prospective Army officers to acquire a thorough grounding in the Constitution and laws of their country, was presented to Cadet Cudahy during the traditional and colorful June Week ceremonies when academic awards were received by the graduating class. At graduation, Cadet Cudahy was commissioned a second lieutenant in the Air Force.

Lieutenant Cudahy was born February 2, 1926, at Milwaukee, Wisconsin, and was graduated from Canterbury School, New Milford, Connecticut. After completing his first term at Northwestern University, he was inducted into the Army in 1943, assigned to the Army Air Forces, and sent to Sheppard Field, Texas, for basic training. During that period he applied for one of the Army-sponsored preparatory courses for West Point. He was accepted and detailed to Lafayette College, Easton, Pennsylvania, where he completed his preparatory course. In July of 1944 he entered the Academy through an appointment tendered by Senator Alexander Wiley, of his home State of Wisconsin.

In addition to leading his class in law, Lieutenant Cudahy led in several other subjects, and ranked as a Distinguished Cadet during his second, third, and last years. At the Academy he continued to pursue the interest in journalism which had made him managing editor of the school paper at Canterbury School. He was for four years a staff member of the cadet publication, *The Pointer*, and was managing editor during his senior year. Also during his fourth year he was co-author of the Cadet Players' Hundredth Night Show, "Malice in Wonderland". He

RICHARD D. CUDAHY

was a member of the Fishing Club and Sailing Club.

During the years of and immediately following World War II, a war bond was given by our Association as a prize. This year the pre-war custom of awarding books was resumed, and Wigmore's *Panorama of the World's Legal System* (de luxe three-volume edition) and Warren's *The Supreme Court in United States History* (two volumes) were presented to the winner as token of his pre-eminence in the law course.

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Dissents and Overrulings:

A Study of Developments in the Supreme Court

by **Ben W. Palmer** • of the Minnesota Bar (Minneapolis)

■ This is the first of a series of articles in which a practicing lawyer and competent legal historian undertakes an analysis of the developments and trends in the Supreme Court of the United States as they affect our American judicial system and the maintenance of the balance of State and federal powers under our constitutional republic. The first article is considerably factual and statistical, with a plentitude of quotations from what members of the Court have said about its majority decisions and each others' opinions. This is to ascertain and state first the nature and extent of the dissents or dissensions and the habitual overturning of precedents long regarded as settled and fundamental law. In following articles Mr. Palmer will undertake to deal with causes and effects.

Mr. Palmer is well known to our readers. A sketch of his career at the Bar and of his qualifications to write on such a subject was given in 32 A.B.A.J. 605; September, 1946. We venture to say here that such a series of articles is not such as a trained trial lawyer, with ingrained reverence for Courts and law, is at all happy to find himself writing and offering for publication. Such a task can be undertaken only from a deep sense of responsibility and duty to the public, the profession, and the Court itself. With Mr. Palmer's opening article should be read our editorial, "Discussing Decisions of the Supreme Court", in this issue. Beyond that, our readers should and will form their own opinions as to the matters concerning which Mr. Palmer has marshalled the facts and the trends as he sees them.

■ The rising tide of dissent in the Supreme Court and its reversal of precedents have become matters of grave concern to those interested in preserving constitutional government in America. The maintaining of the proper balance between State and federal power, and indeed of individual liberty and rights, depends upon the fidelity and prestige of the Court. For without purse, sword, or patronage, its power depends upon long-run public approval. The prestige of the Court is threatened, if it has not already been seriously impaired, by recent divisions of opinion within the Court and its reversal of precedents that had come to be regarded as enduring landmarks of the law. A diminished standing of the Court would be no cause for serious alarm if it were temporary. Whether or not it is temporary depends upon its causes. It is important, therefore, to determine, if possible, what are the causes for these dissensions and reversals. But first the extent of the trend should be determined.

In the early days of the New Deal, a five-to-four split came to be expected when Justices Van Devanter, McReynolds, Sutherland and Butler were so often outvoted that there seemed to be a two-group or two-party schism or division in the Court. Conservatives were arrayed against liberals, with Justice Roberts or Chief Justice Hughes tipping the beam one way or the other. By the 1942 term, however, all the Justices were appointees of the President in office except Chief Justice Stone and Mr. Justice Roberts. But any expectation that members of the Court so constituted would be like-minded was doomed to disappointment. In fact there was a sharp increase in dissents. The combinations and cross-combinations of Justices were without discernible pattern, and it became impossible to predict which Justices would concur, either in majority or in dissent, in a particular case. They could not even be consistently paired. The effect was kaleidoscopic and bewildering to lawyers and clients.

The upward sweep of dissent is indicated by the following percentages of non-unanimous opinions per term:

Year	Per cent
1910	13
1920	17
1930	11
1935	16

Year	Per cent
1936	19
1937	27
1938	34
1939	30
1940	28
1941	36
1942	44
1943	58
1944	58
1945	56
1946	64[1]

Dissension in the Court was dramatically signalized to the world by Mr. Justice Jackson's Nuremberg letter of June 10, 1946.[2] Referring to his "feud" with Mr. Justice Black, Mr. Justice Jackson denied that the new Chief Justice, Mr. Vinson, faced "a mere personal vendetta" which could be "soothed by a tactful presiding officer". He said: "I do not want it to be inferred that I charge Justice Black's sitting in the *Jewell Ridge* case involved lack of 'honor'." But he added: "If war is declared on me I propose to wage it with the weapons of the open warrior, not those of the stealthy assassin." Mr. Justice Jackson's blast was exploited to the utmost by columnists and radio commentators. Cartoonists showed Justices taking pot shots at each other in the smoke of battle leaking through the cracks of a crumbling Supreme Court building.[3] Much as this exploitation is to be deplored and desirable as it may be to forget it, the effect upon public attitude towards the Court cannot be ignored. And a recrudescence of picturesque emphasis upon what are called personal differences in the Court is to be expected if dissension continues.

Members of the Court Comment on Each Other's Opinions

Not only the rising percentages of dissent but the language used in opinions, seems significant of the conditions. Among many illustrations, we have had Mr. Justice McReynolds deploring the "impending moral and legal chaos" that would result from the majority holding in the gold clause cases;[4] Mr. Justice Butler protesting against "the Court's refusal to deal with the case disclosed by the record";[5] Mr. Justice Black accusing the majority of "judicial amendment" of the Constitution;[6] Mr. Justice Roberts saying that "The action taken in this case seems to me to make it impossible for a citizen safely to conduct his affairs in reliance upon any settled body of Court decisions";[7] Mr. Justice Frankfurter referring to "the careful ambiguities and sentences of the majority opinion",[8] and describing another as "purely destructive legislation";[9] Mr. Justice Jackson saying "There is little persuasion and certainly no compulsion in the authorities mustered by the Court's present opinion, which are either admittedly overruled . . . or admittedly distinguishable";[10] Justices Black and Murphy referring to "what is patently a wholly gratuitous assertion as to constitutional law in the dissent of Mr. Justice Frankfurter".[11]

The Court "Is Competing With Congress in Creating New Regulations."

Mr. Justice Jackson in a dissent said: "The Court is not enforcing a policy of Congress; it is competing with Congress in creating new regulations in banking, a field peculiarly within legislative rather than judicial competence".[12] Justices Black and Murphy said of a dissent by Mr. Justice Frankfurter: "The dissent . . . mentions no statute at all. Instead, the chief reliance appears to be upon the law of torts, a quotation from a decision of a lower federal court . . . and the writer's personal views on 'morals' and 'ethics'. . . . For judges to rest their interpretation of statutes on nothing but their own conceptions of 'morals' and 'ethics' is, to say the least, dangerous business."[13] Mr. Justice Jackson protested against "keeping on our books utterances to which we ourselves will give full faith and credit only if the outcome pleases us".[14] And in the *South-Eastern Underwriters* case he spoke of the "recklessness" of the course taken by the majority.[15]

"The opinion of the Court is written on a hypothetical state of facts, not on the facts presented by the record", declared Mr. Justice Douglas.[16] Part of a majority opinion he characterized as "neither good sense nor good law. Such a result makes the way easy for the traitor, does violence to the Constitution and makes justice truly blind."[17] Mr. Justice Black said: "The Court's opinion blends and mingles statements of fact, inferences and conclusions, and quotations from prior opinions wrested from their setting and context in such fashion that I find it impossible to deduce more than that orderly analysis and discussion . . . is avoided. . . . But the general principle that nothing added to nothing will not add up to something holds true in this case."[18] Mr. Justice Frankfurter said: "The Court's opinion has only its own reasoning to support it. Nothing that this Court has ever decided or sanctioned gives it strength."[19] In another case, Mr. Justice Black saw the majority acting as a "super-legislature", disregarding "a century and a half of constitutional history and government", sweeping a long line of cases "into the discard" and "requiring that money costs outweigh human values".[20]

1. For tables, see C. Herman Pritchett, 42 *Am. Pol. Sci. Rev.* 54; 39 *Id.* 43; 44 *Mich. L. Rev.* 430.
2. New York *Times*, June 11, 1946. *Jewell Ridge Coal Corp. v. Local No. 6167* (1945), 326 U.S. 161, upholding portal-to-portal pay.
3. *Time*, Vol. 47, page 21, June 24, 1946.
4. *Perry v. U. S.* (1935), 294 U.S. 330.
5. *Railroad Commission v. Pacific Gas & Electric Co.* (1938) 302 U.S. 388, 418, referring to the valuation rule of *Smyth v. Ames* (1898), 169 U.S. 466.
6. *Connecticut General Life Ins. Co. v. Johnson* (1938), 303 U.S. 77.
7. *Higgins v. Smith* (1940), 308 U.S. 473, 487.
8. *Bridges v. California* (1941), 314 U.S. 252, 279.
9. *Cloverleaf Butter Co. v. Patterson* (1942), 315 U.S. 148, 177.
10. *State Tax Commission of Utch v. Aldrich* (1942), 316 U.S. 174, 186.
11. *Federal Power Commission v. Hope Natural Gas Co.* (1944), 320 U.S. 591, 619.
12. *Anderson v. Abbott* (1944), 321 U.S. 349, 380.
13. *Mercoid Corp. v. Mid-Continent Inv. Co.* (1944), 320 U.S. 661, 673.
14. *Magnolia Petroleum Co. v. Hunt* (1944), 320 U.S. 430, 447, referring to *Williams v. North Carolina* (1942), 317 U.S. 287.
15. *U. S. v. South-Eastern Underwriters Assn.* (1944), 322 U.S. 533, 590.
16. *Cramer v. U. S.* (1945), 325 U.S. 1, 49.
17. *Ibid.*, at page 67.
18. *Associated Press v. U. S.* (1945), 326 U. S. 1, 33.
19. *Davis v. U. S.* (1946), 328 U.S. 582, 603.
20. *Southern Pacific Co. v. Arizona* (1945), 325 U.S. 761, 787-795.

6 Dissents and Overrulings

The *Screws* case,[21] with four opinions running to more than 27,000 words, might be taken as representative of the dissidence of dissent. It was reminiscent of the nine opinions in the *Passenger* cases,[22] the seven in the *Dred Scott* case,[23] and the *Insular* cases, [24] in the second of which the vote was five-to-four. There were five opinions, and the five constituting the majority did not agree in their reasoning processes.[25]

Most unusual was the heated twenty-minute extemporaneous speech for the dissenting minority in the *Gold Clause* cases delivered in a bitter tone by Mr. Justice McReynolds. Of course neither his manner, nor all his words are given in the expurgated official reports: "This is not a thing I like to talk about. God knows I wish I didn't have to. But there are some responsibilities attaching to a man on this bench to reveal to the Bar in all its nakedness, just what has been done. . . . The Constitution, as we have known it, is gone. This is Nero at his worst."[26]

Reversals and Re-reversals of Long-Settled Precedents

If lower Court judges, anxious to avoid error, and lawyers with the responsibility of advising clients, were baffled by dissent and the swirling currents of multiple opinions, they were completely confused by the reversal and re-reversal of precedents, sometimes with vertiginous speed. Landmarks of basic constitutional significance, which for generations had been regarded as rocks perdurable against blasting criticism, frontal attack, the slow erosion of public opinion and changing judicial philosophies, were overturned in quick succession.

A conservative historian labelled the February, 1819, term of the Court as the greatest six weeks in its history because it saw the decisions in *Dartmouth College* case, *Sturges* v. *Crowinshield*, and *McCulloch* v. *Maryland*.[27] These stood for "sacredness of contract, the stability of institutions and above all nationalism in government".[28] A liberal political scientist, referring to the October, 1936, term of the Court, wrote: "The heart of the Constitutional Revolution which was brought about by the New Deal is comprised in the cases found in 301 U.S."[29] Certainly 1936-1937 marked a great beginning of reversals. It is the watershed year.

The *Jones & Laughlin* case[30] practically overruled the recent *Carter Coal* case,[31] and six weeks later the Social Security Act of 1935 was sustained.[32] Then came *West Hotel Co.* v. *Parrish*[33] on March 29, 1937, expressly overruling the *Adkins* case[34] by sustaining a minimum wage law for women and minors. In 1938 *Helvering* v. *Mountain Producers Corp.*,[35] upholding application of the federal income tax to profits of a lessee of State-owned oil lands, foreshadowed the erosion of *McCulloch* v. *Maryland*. It marked the end of reciprocal immunity and expressly overruled two earlier cases.[36] Then *Erie R. Co.* v. *Tompkins*[37] held that federal Courts must follow State Courts in matters of common law and expressly overruled *Swift* v. *Tyson*.[38] In 1939 *Graves* v. *New York*[39] upheld application of a State income tax to the salary of an employee of the Home Owners Loan Corporation and expressly overruled *Collector* v. *Day*,[40] decided in 1871, and *New York ex rel. Rogers* v. *Graves*,[41] decided two years before. *O'Malley* v. *Woodrough*[42] overruled *Evans* v. *Gore*[43] which had held unconstitutional the

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application of the federal income tax to the salary of a federal judge. The decision also overruled *Miles* v. *Graham*.[44]

Further Overruling of Precedents Long Regarded as Well Established

In 1940 *Madden* v. *Kentucky*[45] overruled *Colgate* v. *Harvey*.[46] It upheld as against the privileges and immunities clause of the Fourteenth Amendment a statute imposing on a testator taxes five times as great on money deposited in banks outside the State as it did on money of others deposited in banks within the State. *Helvering* v. *Hallock*[47] overruled *Helvering* v. *St. Louis Union Trust Co.*[48] in construing the Revenue Act with respect to inclusion in the

21. Screws v. U. S. (1945), 325 U.S. 1.
22. (1849), 48 U.S. (7 Howard) 282, 494.
23. *Dred Scott* v. *Sanford* (1857), 9 Howard 393. Justice McLean lost his temper in dissent and spoke of the majority resorting to "rather sharp practice". "Many . . . things", said by the Court, he said, were "of no authority".
24. *De Lima* v. *Bidwell* (1901), 182 U.S. 1; *Downes* v. *Bidwell* (1901), 182 U.S. 144. Another five-to-four case was *Hawaii* v. *Mankichi* (1903), 190 U.S. 197. See *New York* v. *U. S.* (1946), 326 U.S. 572, wherein the majority of six agreed on result, but gave three different theories. Two dissents added a fourth.
25. For other famous dissents, see Daniel, J. in the *Passenger Cases* (1849), 48 U.S. (7 Howard) 282, 494; *Dred Scott* v. *Sanford* (1857), 9 Howard 393; *Jackson* v. *Steamboat Magnolia* (1857), 61 U.S. (20 Howard) 296, 320, 321; *The License Cases* (1847), 46 U.S. (5 Howard) 504, 612.
26. *Newsweek*, Feb. 23, 1935, page 7. See also Edward S. Corwin, *Constitutional Revolution, Ltd.*, (1941), pages 45-46.
27. *Sturges* v. *Crowninshield* (1819), 4 Wheat. 122; *Dartmouth College* v. *Woodward* (1819), 4 Wheat. 518; *McCulloch* v. *Maryland* (1819), 4 Wheat. 316.
28. Albert J. Beveridge's *Life of Marshall* (1916), Vol. 4, page 221; See also Charles Warren, *The Supreme Court in U. S. History* (1923), Vol. 1, pages 475-540.
29. Edward S. Corwin, *Constitutional Revolution, Ltd.*, (1941), pages 78-79.
30. *NLRB* v. *Jones & Laughlin Steel Corp.* (1937), 301 U.S. 1.
31. *Carter* v. *Carter Coal Co.* (1936), 298 U.S. 238.
32. *Steward Machine Co.* v. *Davis* (1937), 301 U.S. 548.
33. (1937), 300 U.S. 379.
34. *Adkins* v. *Children's Hospital* (1923), 261 U.S. 525.
35. 303 U.S. 376.
36. *Gillespie* v. *Oklahoma* (1922), 257 U.S. 501; *Burnet* v. *Coronado Oil & Gas Co.* (1932), 285 U.S. 393.
37. (1938), 304 U.S. 64.
38. (1842), 16 Peters 1.
39. 306 U.S. 466.
40. 11 Wall. 113.
41. (1937), 299 U.S. 401.
42. (1939), 307 U.S. 277.
43. (1920), 253 U.S. 245.
44. (1925), 268 U.S. 501.
45. 309 U.S. 83.
46. (1935), 296 U.S. 404.
47. (1940), 309 U.S. 106.
48. (1935), 296 U.S. 39.

gross estate for estate tax purposes of certain property transferred in contemplation of death. In the same year the Court held[49] *Connally* v. *Union Sewer Pipe Co.*[50] to have been "worn away by the erosion of time". That case had held a State anti-trust law to be a denial of equal protection of the laws because it did not apply to agricultural products or livestock in the hands of the producer or raiser. And in 1941 *Nye* v. *United States,*[51] reversing a conviction for contempt of Court, expressly overruled *Toledo Newspaper Co.* v. *United States.*[52]

The *Darby Lumber Co.* case,[53] upholding the Fair Labor Standards Act of 1938 and squarely overruling *Hammer* v. *Dagenhart,*[54] unanimously adopted what it called "the powerful and now classic dissent" of Mr. Justice Holmes in the earlier case. *United States* v. *Classic*[55] upheld Congressional regulation of primary elections and set aside the *Newberry* case doctrine of twenty years before.[56] At the same term *California* v. *Thompson*[57] overruled the *Di Santo* case[58] by upholding a State statute requiring licenses of transportation agents where the Act applied alike to agents negotiating for intrastate as well as interstate transportation. In 1942 the Court held that the Fourteenth Amendment does not prohibit double taxation[59] and expressly set aside *First National Bank of Boston* v. *Maine,*[60] unanimously held valid a sales tax on the purchase of materials by a contractor for building an army camp for the United States under a cost-plus contract, overruling two previous cases.[61] It injected a degree of uncertainty into the validity of foreign divorces under the full faith and credit clause[62] and overruled *Haddock* v. *Haddock.*[63]

Reversals of Rulings in Cases Involving Jehovah's Witnesses

In June of 1940 the *Gobitis* case[64] upheld a schoolboard regulation that pupils salute the national flag, notwithstanding objections by Jehovah's Witnesses; but three years later, after Justices Black and Douglas had changed their minds, that case was overruled.[65] An even quicker reversal came in another case involving Jehovah's Witnesses. In the *Opelika* case,[66] on June 8, 1942, the Court had upheld convictions for violation of a local law requiring a license for the distribution of literature because it considered that such law did not deny free speech, press or religion. Chief Justice Stone and Justices Black, Murphy and Douglas dissented.

In October of 1942 Justice Byrnes, who had voted with the majority, resigned. On February 11, 1943, he was succeeded by Mr. Justice Rutledge from the Court of Appeals for the District of Columbia. In a dissent in that Court he had expressed views inconsistent with the opinion of the majority in the *Opelika* case.[67] In March of 1943 another case involving Jehovah's Witnesses was argued; and on May 3, 1943, less than a year after the *Opelika* case had been decided, the judgment in it was vacated.[68] The reversal was carried by the vote of the newly appointed Justice Rutledge over dissent by Justices Reed, Frankfurter, Jackson and Roberts.

At the 1943 term there were two important reversals. *Smith* v. *Allwright,*[69] reversing an earlier case,[70] held that Negroes could not validly be denied the right to vote in Democratic primaries in Texas. But a reversal of far greater effect was *United States* v. *South-Eastern Underwriters Association.*[71] Over dissents by Chief Justice Stone and Mr. Justice Frankfurter and a partial dissent by Mr. Justice Jackson, the Court overturned *Paul* v. *Virginia,*[72] decided in 1869, which, together with a long line of subsequent cases, had uniformly laid down the rule that making contracts of insurance across State lines was not interstate commerce.

Reversals of Long-Settled Policies of Congress and Decisions of the Court

In 1946, in *Girouard* v. *United States,*[73] by a five-to-three vote, the rule of the *Schwimmer,*[74] *Macintosh*[75] and *Bland*[76] cases, to the effect that one who refused to bear arms in defense of the United States was ineligible for citizenship, was reversed. This was despite the fact, pointed out by Chief Justice Stone in dissent, that for six successive Congresses, extending over more than a decade, and after full hearing and debate on the floor, proposals to reverse the rule announced previously by the Court had been rejected.

(See discussion in "American Citizenship: Can Applicants Qualify Their Allegiance?", 33 A.B.A.J. 95; February, 1947).

In 1946 also, although there was no express overruling of the doctrine of *McCullough* v. *Maryland,*[77] the Court explicitly recognized that "we have moved away from the theoretical assumption that the national government is burdened if its functionaries, like other citizens, pay for the upkeep of their State governments, and we have denied the implied constitutional immunity of federal officials from State taxes".[78] Also not expressly set aside but dis-

49. *Tigner* v. *Texas* (1940), 310 U.S. 141.
50. (1902), 184 U.S. 540.
51. 313 U.S. 33.
52. (1918), 247 U.S. 402.
53. *U. S.* v. *Darby Lumber Co.* (1941), 312 U.S. 100.
54. (1918), 247 U.S. 251.
55. (1941), 313 U.S. 299.
56. *Newberry* v. *U. S.* (1921), 256 U.S. 232.
57. (1941), 313 U.S. 109.
58. *Di Santo* v. *Pennsylvania* (1927), 273 U.S. 34.
59. *State Tax Commission of Utah* v. *Aldrich* (1942), 316 U.S. 174.
60. (1932), 284 U.S. 312.
61. *Alabama* v. *King & Boozer* (1941), 314 U.S. 1, overruling *Panhandle Oil Co.* v. *Mississippi* (1928), 277 U.S. 218, and *Graves* v. *Texas* (1936), 298 U.S. 393.
62. *Williams* v. *N. C.* (1942), 317 U.S. 287.
63. (1906), 201 U.S. 562.
64. *Minersville School District* v. *Gobitis* (1940), 310 U.S. 586.
65. *West Virginia State Board of Education* v. *Barnette* (1943), 319 U.S. 624.
66. *Jones* v. *City of Opelika* (1942), 316 U.S. 584.
67. *Bussey* v. *District of Columbia* (1942), 129 F. (2d) 24, 28.
68. *Murdock* v. *Pennsylvania* (1943), 319 U.S. 105.
69. (1944), 321 U.S. 649.
70. *Grovey* v. *Townsend* (1935), 295 U.S. 45.
71. (1944), 322 U.S. 533.
72. (1869), 8 Wall. 168.
73. 328 U.S. 61.
74. *U. S.* v. *Schwimmer* (1929), 279 U.S. 644.
75. *U. S.* v. *Macintosh* (1931), 283 U.S. 605.
76. *U. S.* v. *Bland* (1931), 283 U.S. 636.
77. (1819), 4 Wheat. 316.
78. *New York* v. *U. S.* (1946), 326 U.S. 572.

approved by the Court was the distinction made in *South Carolina* v. *United States*[79] between the proprietory activities of a State which may be taxed by the federal government and its "usual" governmental functions which cannot be.[80]

The *South-Eastern Underwriters* case was argued on January 11, 1944 and decided June 5, 1944. On May 9, 1944, Mr. Justice Jackson speaking to the American Law Institute[81] had said:

> *Stare decisis* is an old friend of the common lawyer, who is now much concerned about its anemic condition. I suppose we would not much disagree about the theoretical significance of the doctrine of *stare decisis* however sharply we might divide about applying it to specific cases. I never have, and I think few lawyers ever have, regarded that rule as absolute. There is no infallibility about the makers of precedents. We cannot deny to the judicial process capacity for improvement, adaptation and alteration unless we are prepared to leave all evolution and progress in the law to legislative processes.
>
> But because one should avoid Scylla is no reason for crashing into Charybdis. I cannot believe that any person who at all values the judicial process or distinguishes its method and philosophy from those of the political and legislative process would abandon or substantially impair the rule of *stare decisis*. Unless the assumption is substantially true that cases will be disposed of by application of known principles and previously disclosed courses of reasoning, our common-law process would become the most intolerable kind of *ex post facto* judicial law-making. Moderation in change is all that makes judicial participation in the evolution of the law tolerable. To overrule a precedent is serious business.[82]

Most "Intolerable Kind of Ex Post Facto Judicial Law-Making"

Because of the overturning of important landmarks in the law during the past ten years there are those who feel that there is such a lack of "moderation in change" as to result in "the most intolerable kind of *ex post facto* judicial law-making". These recall the words of Justice White in the famous *Pollock* income tax case:

> Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result . . . If the permanency of its (the Court's) conclusions is to depend upon the personal opinions of those who, from time to time, may make up its membership, it will inevitably become a theatre of political strife and its action will be without coherence or consistency . . . Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people.[83]

79. (1905), 199 U.S. 437.
80. *New York* v. *U. S. (1946)*, 326 U.S. 572.
81. "Decisional Law and Stare Decisis", 30 A.B.A.J. 334; June, 1944.
82. See also Francis R. Aumann, *The Changing American Legal System* (1940), page 212; Edward S. Corwin, *The Twilight of the Supreme Court* (1934), page 120.
83. Dissent in *Pollock* v. *Farmers Loan & Trust Co.* (1895), 157 U.S. 429, 651.

Notable Institute Planned as to Teaching of International and Comparative Law

■ The Association of American Law Schools will sponsor in New York this summer an Institute on the teaching of international and comparative law. With the cooperation of the Carnegie Corporation, the sessions of the Institute will be held in the house of the Association of the Bar of the City of New York from August 23 through September 4. The holding of this Institute is the result of the rapidly growing interest expressed by law schools in those fields of law and will aim to assist in the preparing of qualified teachers. The discussions will be built around such topics as course objectives and content, bibliography and teaching materials, teaching methods, and recent developments in the substantive law.

The first seven days of the Institute will be devoted to international law, and the rest of the time to comparative law. The regular sessions will be held from 9 to 12 and from 2 to 5 o'clock each day, and there will be occasional evening lectures on subjects of current interest, as well as meetings of a social nature. No sessions will be held Sunday, August 29.

Among those who will participate in the Institute are Justice Green Hackworth of the World Court, Justice Robert H. Jackson of the United States Supreme Court, Philip C. Jessup, United States Delegate to the Interim Council of the United Nations and Professor of Law in Columbia University, Professor James Brierly of Oxford University, Dean Edwin D. Dickinson of the University of California School of Jurisprudence, Professor Max Rheinstein of the University of Chicago, Professor John Hazard of Columbia University, Professor Hessel Yntema of the Yale University Law School, Professor Josef L. Kunz of the University of Toledo, Alger Hiss, President of the Carnegie Endowment for International Peace, Durward Sandifer of the Department of State, and Philip W. Thayer, Professor of International Commercial Law with the Foreign Service Educational Foundation.

The sessions of the Institute will be open without charge to any American law school teachers who may care to attend and to others who may have special reasons for interest in the discussions. Invitations are being extended also to law school teachers in Canada and in the American republics.

1948 Ross Prize Essay:

Steps To Restore Powers of States and Localities

by Frederic Solomon • Assistant General Counsel, Board of Governors of the Federal Reserve System

■ Through the generous provision which the late Erskine M. Ross, of Los Angeles, made in his will, our Association is able to offer each year a substantial prize to induce members of our Association to submit in the form of essays the results of their study of a selected subject under discussion in the forum of American public opinion. Since 1934, when the Ross Essay competition was established, the subjects selected have been of vital interest to the profession and the public, and the essays have been recognized as valuable, and usually as constructive, contributions to an informed opinion.

This year's subject invited the contestants to outline and discuss the practical steps which should be taken by the national and State governments to preserve the American federal system and restore the powers and responsibilities of State and local governments. Some thirty-one essays were submitted, by lawyers of marked ability. As reported on page 552 of this issue, the Board of Governors, on the recommendation of a distinguished committee which read the essays, bestowed the $2500 prize on an essay which had been written by Frederic Solomon, formerly of Atlanta but now of Washington, D. C., with an "honorable mention" to Donald Kepner, of the University of Louisville (Kentucky), who also practiced law for a time in Atlanta, Georgia.

We publish below the essay that won the prize which will be presented to Mr. Solomon at our Annual Meeting in Seattle. It will be found to discuss specifically the basic causes of present dangers to our constitutional system and also the author's suggestions of basic remedies. Several of his proposals seem to be worthy of consideration by the Congress and the States, e.g., the creation of a National Commission on Intergovernmental Relations, with diversified appointments and representation of each house of the Congress, the executive branch, the States, local governments, industry, labor and agriculture, to be on guard against unneeded extensions of federal power and to work out and recommend practicable decentralizations. The competition for the Ross Essay Prize brings to mind each year Judge Ross' devoted interest in our Association (see 33 A.B.A.J. 1173; December, 1947) and the availability of our Association as a most appropriate agency through which gifts or bequests can be made to give lasting support to the vital principles of our representative republic.

■ We live in an age of nation-wide communication. Every day, more and more of the one hundred forty million people scattered throughout the forty-eight States are listening to the same coast-to-coast broadcasts, reading the same national magazines, seeing the same Hollywood movies, and reading the same syndicated columns. In many ways this is a necessary and desirable part of our growing up. Many of our problems are national and will yield only to a national viewpoint. Only the national Government can carry out an adequate foreign policy, "provide for the common defense", and design adequate over-all policies to lessen the severity of "boom and bust".

I. THE ATTRACTION OF POWER TO THE NATIONAL GOVERNMENT: A BASIC CAUSE AND BASIC REMEDY

Basic Cause: National Viewpoint on Joint Problems

But the growing development of a national viewpoint has disadvantages along with its advantages. By focusing public attention on the national scene, it tends to create a strong attitude of "let Uncle Sam do it". That attitude can carry over to problems for which Uncle Sam can, at best, supply only a very partial answer.

It is important to recognize that many problems confronting the country today are essentially "joint" problems—they are partly national, partly State and local. They are national in the sense that they are common to many different localities. They are national, also, in the sense that failure to solve them injures the whole country. But they are local in the sense that the best solution—or a large part of it—must necessarily

be worked out in the local community.

Some of our most controversial problems are of this "joint" character. Housing, health, and education are among the more important ones. The "joint" nature of these problems tends, in itself, to create uncertainty over where the function should be performed. Under the influence of an increasing national viewpoint, it is easy to fall into the habit of looking to the national Government to do the job.

Actually, these joint problems require a joint solution. Efforts to solve them *solely* at the national level or *solely* at the State-local level do not work out well. The great depression threw a glaring spotlight on the inadequacies of a purely State-local approach. The State and local governments simply could not cope with the "local" problems that a disjointed national economy thrust upon them. They were helpless before the flood of dispossession, destitution and human misery. No matter what the niceties of constitutional doctrine or governmental theory, the grim necessities of survival forced the federal Government to step into the breach.

From an almost purely State-local approach to such joint problems, we have since then been moving at headlong speed toward an almost purely national approach. This can have dangers that are only beginning to be vaguely recognized. It can give our entire Government a dangerous brittleness, clumsiness, and remoteness from the people.

Experience in related fields warns us of the dangers of overcentralization. Large business corporations have found it wasteful and inefficient to overcentralize their organizations. They have deliberately decentralized both operations and authority in order to insure alertness and vigor in all parts of the organization. The testimony of captured Nazi documents and Nazi generals makes it clear that overcentralization of authority was an important cause of Nazi defeat. The general in the field could not move a division even at critical moments without getting permission from the Führer.

Because an excessively national approach to our joint problems leads to overcentralization, it will sooner or later prove defective, just as did the earlier overemphasis on the State-local approach. The only solution that will work in the long run is a joint approach—one that will focus national attention on the problems and at the same time emphasize the importance of State-local power and responsibility in solving them.

Basic Remedy: National and State Committees on Intergovernmental Relations

In order to achieve the necessary joint approach to our joint problems, there should be federal legislation to establish a National Committee on Intergovernmental Relations. This Committee should have the job of focusing national study and research—and national attention—on the joint problems of federal-State-local government. It should concentrate on the steps to be taken at each level to keep every governmental activity, and every part of it, as decentralized as possible and as close as possible to the people who are directly affected by it. It should deal not only with the distribution of functions between the national and State governments but also with the further distribution between State and local governments.

The Committee should (1) make a continuous study of the problems, (2) publish information about them, and (3) make definite recommendations for both legislative and administrative action at all three levels.

In short, the Committee should guide national public opinion into channels that will strengthen State and local authority rather than weaken it.

Although established by federal law, the Committee should be far more than just another federal agency. It should be a "joint" agency in the truest sense of the word. To reach that goal its membership should represent both houses of Congress, the federal executive, State governments and local governments. It should also represent industry, agriculture and labor, because each of these has a vital interest in its successful operation.

Such representation could be achieved in a variety of ways. One way would be to have two members appointed by the presiding officer of the Senate to represent the Senate, two members appointed by the presiding officer of the House of Representatives to represent the House of Representatives, and twelve others appointed by the President with the approval of the Senate—two each to represent the federal executive, the States, the local governments, industry, agriculture and labor. A seventeenth member would be appointed by the President with the approval of the Senate to act as chairman and represent the public generally.

The Committee could help to work out effective, decentralized, State-local administration for many nation-wide programs. It should constantly examine both existing laws and proposed legislation with a view to recommending changes in that direction. It would need a small professional staff to assist in its continuous work.

In order to cooperate with the national Committee and to deal with the problems peculiar to its own State, each State should establish a similar State Committee on Intergovernmental Relations. It should give special consideration to relations between the State and local governments, again looking toward the greatest practicable decentralization of power and responsibility.

The establishment of the National and State Committees would not mean an immediate end to the problem of overcentralization. That problem, like many others in human affairs, is one that must be solved over and over again, in many forms and in varied circumstances. The great advantage of the National and State Committees is that they would provide *for the first time* the machinery that is required for working out the changing solutions to meet changing conditions. In that sense, the

Committees would supply a basic remedy.

We will see later that in addition to dealing with the basic tendency of a national viewpoint to attract power to the national government, the Committees would provide workshops for solving other phases of the general problem of restoring State and local powers.

II. THE REPULSION OF POWER FROM THE STATE AND LOCAL LEVELS: A BASIC CAUSE AND BASIC REMEDY

Basic Cause: Financial Weakness of State and Local Governments

Side by side with the growing national viewpoint which tends to attract power to the national government, there is an important development which tends to repel powers from the State and local governments. This is the increasing financial weakness of those governments.

Part of the trouble lies in antiquated State and local tax systems, of which more will be said later. But there is no escaping the fact that the power to reach important sources of revenue is greatly limited in the case of the States, and even more restricted in the case of the local governments.

These limitations are inherent in our constitutional system and the great enterprise economy that has grown up under its protection. When the States gave up the authority to levy tariffs and to interfere with interstate commerce, they immediately sacrificed vital sources of revenue. To be sure, the gains were far greater—more prosperity, a vastly improved economy, a higher standard of living. But the gains were in a different coin from the loss. The point is basic and deserves explanation.

Freedom of movement and of exchange throughout the country has stimulated industry to find the best and most economical locations, has given our labor force a mobility that is the marvel of the world, and has provided nation-wide markets that encourage the economies of mass production. Each of us owes much to these developments which have helped to give us more of the necessities and comforts of life. But what happens when the individual State or local government tries to collect the taxes that are needed to provide essential services for its people? It finds that several harsh realities frustrate its revenues.

For the new kind of wealth has very few roots in the land. It consists largely of earning power—of claims to income. It moves around even more freely than the people and goods that produce it. George Washington could not have moved his plantation from Virginia even if he had wanted to. But a modern corporation can readily shift its charter from one State to another, and it can move entire plants—or make vital decisions on where to locate new ones—with a relatively free hand.

Two consequences follow. (1) Most of the wealth is concentrated in a few centers. It is entirely beyond the reach of most other States, not to mention the local governments. (2) Even those few States where the wealth is concentrated are limited by the fact that it can readily move elsewhere. They have only tenuous control over it, and they must tread lightly in taxing it.

The net result is that modern wealth is relatively immune to State and local taxation. That is a slightly simplified picture, but essentially correct.

To make matters worse, the State and local governments have been faced with heavier demands on their slender treasuries at the same time that their revenues were being weakened. The growing concentration of people in cities has increased the need for a wide variety of public services ranging from police and fire protection to sewage disposal, public health, and highway construction. Larger amounts have been needed to provide for dependent groups such as the unemployed and aged. The drive on illiteracy has required more funds for public education.

As if to cap the climax, the depression of the 1930's disclosed still another fiscal weakness of the State and local governments. Almost none of them had a credit strong enough to borrow the funds that were required to tide them over those disastrous years.

Faced with the bankruptcy of their State and local governments, it is not surprising that people turned elsewhere for the solution of their pressing problems. The national government, through its income taxes, could reach modern wealth and tax it on the scale required for present-day needs. The national government had a credit strong enough to tide over a serious depression. In short, the national government stood ready to fill the vacuum created by State and local paralysis—but it was largely the State and local governments' own financial weakness that drove power from them and created the vacuum.

We have already seen that National and State Committees on Intergovernmental Relations are needed as a basic remedy for the tendency of the national government to attract power and responsibility. Similarly, another basic remedy is needed for the financial weakness of State and local governments which causes them to repel power and responsibility.

Basic Remedy: Adequate Grants-In-Aid

The fact that the national government is better able to collect the taxes required for a particular program is no assurance that it is well fitted to administer the program.

In many instances the national government should finance the program through grants-in-aid and the State and local governments should administer it. This need not lead to either excessive control at the national level or inefficiency at the State-local levels.

Federal grants for highways and for old age assistance and other welfare programs have been an outstanding success. They have clearly demonstrated that flexible adminis-

trative control at the national level can be adequate to insure efficiency and prevent waste while still maintaining local independence. The experience has been repeated in programs of State aid to their localities.

Far from weakening the recipient, such grants are a positive source of strength.

On the other hand, the alternatives to such grants-in-aid are truly devastating to State and local authority. These unpleasant alternatives have been analyzed by Hansen and Perloff in their work on *State and Local Finance in the National Economy* and by the Council of State Governments in its report on *State-Local Relations.*

In general there are three alternatives to such aid, each of them highly undesirable. First, States and localities can omit or neglect important services. This will weaken their popular standing and drive power from them as we have already seen. Second, they may try to bolster their resources by adopting ill-suited taxes. These result in glaring inequities, and in some cases they damage the national economy by burdening interstate commerce in the practical sense if not in the constitutional sense. Third, the function may be assumed by the national government even though it could be better administered at the State or local level.

Consideration of these alternatives makes it clear that adequate federal grants are the thing needed to strengthen State and local governments so that they will no longer repel the powers and responsibilities which should properly be theirs.

The chief problem here is to insure that the grants will be adequate —not only in total amount, but also as between different States. The present system of requiring States to match a certain portion of the federal grant is essentially defective. It assumes that the grant is a favor, one which the State must earn by its matching contribution. It overlooks the joint nature of such undertakings. It ignores the fact that both State and nation benefit from the program, that effective administration by the State is no less a contribution than effective financing by the national government.

When tax-hungry Mississippi educates a child, for example, it performs a service not only for the child and for Mississippi, but also for the nation—especially since the child may well spend his grown-up years in wealthier New York or California.

As an important step in strengthening State and local governments, the federal Congress should firmly reject the idea of basing federal grants on the ability of the State to make a matching contribution. It should adopt, instead, the principle of fitting the grant to the size of the job done under the particular program. In some cases the best measure would be size of population. In others it would be certain segments of the population such as those of school age (for educational programs) or those past sixty-five or seventy (for old age assistance programs). Per capita income should also be taken into account in some instances.

The National Committee on Intergovernmental Relations can perform a valuable service in helping to work out suitable standards to be followed in connection with grants for different programs.

The important thing is that the strengthening effect of federal grants be recognized and that they be boldly used.

In short, there are three fundamental features of federal grants. (1) They are a basic means of strengthening State and local governments rather than weakening them. (2) They should be placed on a size-of-job basis rather than a fund-matching basis. (3) They should be boldly used as a basic remedy for the financial weakness which tends to drive power away from States and local governments.

III. FURTHER STEPS AT EACH LEVEL

Within the framework of the two basic remedies outlined above, further steps are needed at both the national level and the State-local levels. The National and State Committees on Intergovernmental Relations can help greatly in working out and applying these measures, which are outlined below.

At the National Level

1. *Maintaining National Prosperity.*—One of the greatest contributions that can be made at the national level is to maintain high production and employment. This would go far toward saving State and local governments from the increased relief burdens and the reduced tax revenues that accompany business dislocations. The chief reliance here must be the national policy of maximum production and employment established by the Employment Act of 1946, and the governmental machinery established by that Act—the Council of Economic Advisers in the executive branch and the Joint Committee on the Economic Report in Congress.

2. *Crediting State Taxes Against Federal Taxes.*—Further efforts should be made to strengthen State finances through allowing certain State taxes to be counted as a credit against federal taxes. It is clear, for example, that the federal credit for State estate taxes makes it easier for one State to levy such taxes without driving wealth to another. The federal credit for State unemployment taxes has a similar effect in its field. This is one of the joint problems on which the National Committee on Intergovernmental Relations can make an important contribution.

3. *Providing for Taxes (or Equivalent Payments) on Federal Property.*—The growth of federal activity confronts State and local governments with increasing problems of tax-exempt federal property. They must find some substitute for the lost revenue. There have been various proposals for authorizing taxation of such property or payments in lieu of taxes. Fortunately, the problem has been reduced somewhat by recent decisions of the United States Supreme Court limiting the extremes of federal tax exemption. *(S.R.A., Inc.* v. *Minnesota,* 327 U.S. 558;

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A World Constitution:

Analysis of the Draft by the Hutchins Committee

by **Ray Garrett, Jr.** • of the Harvard Law School (Third Year Student)

■ The *Journal* has from time to time, during several years past, published material which assisted its readers in studying the problems of international organization for peace and law and the ways in which some of these problems are being dealt with by legal draftsmen. Instances are the Charter of the United Nations and the Statute of the World Court in 1945, the Inter-American Treaty of Reciprocal Assistance (33 A.B.A.J. 1058; October, 1947), the Brussels Agreement of Western European Powers (34 A.B.A.J. 406; May, 1948), the articles contributed by Samuel J. Kornhauser and John C. Ranney on world government from opposing points of view (33 A.B.A.J. 563, 567; June, 1947), and reviews of many books dealing with various aspects of international organization and world law. With the persistent agitation for world government and the natural belief of many lawyers that such a project can be usefully discussed only if it is first put in a definitive form, the appearance of a considered draft of a Constitution for a Federal Republic of the World, prepared by a Committee headed by Chancellor Robert M. Hutchins, of the University of Chicago, a former Dean of the Yale Law School, is a challenge to lawyers to study the subject further and form and express their own views about it, in their respective communities. Obviously, a great deal of the persistent agitation and propaganda which is taking place throughout the country on the subject is not based on a consideration of the legal and practical difficulties which arise when it is sought to translate a hope, a fear, or an ideal, into an organic law to govern men and nations. As is pointed out more fully in an editorial in this issue, lawyers in particular owe to the public the duty of seeing to it the sponsors of such discussions in their communities shall "come down to earth" and face the realities of specific and practicable structure and provisions. In furtherance of such a study of the subject, we publish this trenchant article, which analyzes and comments on the draft submitted by the Hutchins Committee.

■ A Committee to Frame a World Constitution published in March the product of two years' labor in a document which it entitled: "Preliminary Draft of a World Constitution". The document appeared first in the March issue of the Committee's own monthly periodical, *Common Cause*, and was republished, rather surprisingly, in *The Saturday Review of Literature* for April 3, 1948. This Committee was formed at the University of Chicago shortly after the first atomic bomb fell on Hiroshima. The Committee and its project at first attracted some notice, but then rather dropped out of sight. It consisted finally of the following signers of the draft: Robert M. Hutchins, G. A. Borgese, Mortimer J. Adler, Stringfellow Barr, Albert Guerard, Harold A. Innis, Erich Kohler, Wilber G. Katz, Charles H. McIlwain, Robert Redfield, and Rexford G. Tugwell.

When the Committee was created, the atomic bomb was still a novelty, and many Americans were stunned with the prospect that we might at last disintegrate the universe. The Committee took as its basic premise the proposition, which was a commonplace in those days, that the world as we know it could no longer survive a major war. We would have "not one Rome but two Carthages". World government through peaceful means rather than world empire by the few survivors over the radioactive ruins was taken as an absolute condition precedent to the survival of Western civilization and of most of its members. The Committee members adopted as their slogan: "World government is necessary, therefore it is possible"; they set about drafting a constitution for this necessary and therefore possible thing. Someone, they said, should get to work on the details. In October of 1946, the Committee issued a statement of policy, published on page 19 of its *Common Cause* for July, 1947. This said in part:

> Unspecified propaganda for a world government whatever, whose instruments and functions remain unknown, is not even utopian, and would soon be self-defeating; while partial amendments to the United Nations Charter, whether likely to be accepted or not, bear significance only as entering

wedges for far more radical transformations. . . . It may well be that the machinery and authority of the U.N., if the U.N. so decides, will prove someday to be the best available stepping stones toward a real world union. In this context the constitutional draft we are trying to design should be considered as an allround amendment to the U.N. Charter, adopting its ends while proposing the adequate means.

A document of this kind endorsed after necessary improvements and changes by public opinion and responsible governments, and containing a practicable and unequivocal promise to the whole of mankind, should—if still in time—help strongly to prevent World War III. Were an armed conflict to become inevitable, such a document would influence certainly far more efficiently and credibly than did the Atlantic Charter, the course and outcome of the struggle and help to shape a livable world for the survivors.

It is a paradox that when the draft was produced, in 1948, although no one could then say that war had grown less imminent or less destructive, these proposals caused only the mildest stir.

Argument as to World Government Should Be Based on Practicalities

The argument for world government as the only alternative to war is simple and well-known. Its cogency, outside of the small circle of devotees who have agitated in its behalf for many years, rests in a practical sense on the estimate made as to the destructiveness of the next war. Although it would not be unthinkable to advocate world government to stop the slaughter of an old-fashioned war, it is safe to say that most of the new adherents to the cause, particularly the many who are not otherwise given to fanciful speculation, are swayed by a vision of the impending destruction of almost everything and everybody. Presumably those who have not been swayed have either a simple faith in the ability of science to counteract science or in the habit of humanity somehow to pull through, or else they weigh the possibility of world government as so slight that they discard it as a working alternative and plan simply to be perhaps the last to go down.

Whether a reasonable man can adopt the alternative of government peacefully attained has not yet been given a fair investigation. The subject is discussed in the broadest generalizations as to human nature and motivation and endless historical analogies. It would be better to find out what a real world government might look like. An architect's sketch is what the Committee has, as one aim, sought to provide. If it generates speculative discussion on details, it will have served a great purpose.

Besides allowing an examination of practicability, the world government idea needs specification for another purpose. World government in general is too broad an idea for any intelligent man to be for or against. It matters what kind of world government. An intelligent person cannot be *for* just any kind of world government. He must know what he must pay for his survival.

Committee Regards Only Complete World Government as Practicable

The Committee differs from world federalists, with whom in general it should be classified. This difference is not only in the Committee's emphasis on details but also in its insistence that only a complete world government founded on "justice" is practicable at all and that a partial alliance or confederation based merely on "an agreement to survive" is impossible. In this last respect the Committee refers to itself as "maximalists" and to other world federalists as "minimalists". This is an unpleasant bit of Russian revolutionary jargon which nevertheless expresses a familiar split in political movements between "bit-by-bitters" and "whole-hoggers". The Committee's argument is that most of the world is too weak and too poor to be properly afraid of the atomic bomb or to cooperate fully in any world government whose sole aim is to keep the peace while preserving indefinitely the *status quo*. Only a world government which can offer most of the world's people a real prospect of release from the worst of their afflictions—what the Committee calls "justice"—can hope for the enthusiastic support of the people of the world, as the Committee sees it. One needs to learn from examining the draft constitution what the Committee means by "justice" before saying "amen" to this proposition.

Any technical criticism of the Committee's draft constitution, however unfavorable and cursory, must keep in mind the basic assumption on which its existence rests. I refer not to the Committee's particular notion of "justice" but rather to its more basic assumption that a whole world government, with all the functions of a government, is the least which has any chance of being accepted. This would eliminate those various schemes which would make of world government a device for the international control of the more obviously destructive weapons and the forced keeping of the peace. Having made such an assumption, it is nevertheless necessary, in order to keep the speculation at all "down to earth", that the world government be devised for living persons and be made acceptable to at least the majority of the most important among them. The workableness of an idea for the world constitution must be tested according to its practicability and its acceptability to enough of the right people, assuming that only a complete and plenary government has any chance of being accepted.

Three Most Provocative Elements in the Draft

By the nature of the subject, every clause of this draft could easily provoke a treatise of discussion, but in the larger view three elements seem the most provocative. First, the conception of "justice" and "constitutional rights"; secondly, the federal structure, or lack of it; and thirdly, the regional representative system. The omission of the problem of controlling world armaments is noticeable. The fact is that however difficult it may be actually to transfer

control of the world's armaments to a world authority, the problem of control, given the world authority, may be deemed relatively easy, at least as to constitutional provisions. The world judiciary, on the other hand, deserves longer discussion than is here possible.

The Committee's concepts of "constitutional rights" and "justice" are primarily embodied in the Preamble, the Declaration of Duties and Rights, and some of the clauses in the section entitled "World Law". The Preamble gives the impression that perhaps preambles ought to be done away with altogether in modern charters and constitutions, or else declared not legally part of the document, for they seem increasingly to fall into the hands of the lesser poets or worse and thus to suffer from a "jabberwockian brilligness". The statement in this Preamble that "the advancement of mankind in spiritual excellence and physical welfare is the common goal of mankind" is fine enough; but it goes on to say that "therefore the age of nations must end, and the era of humanity begin". The imagination shudders at the fine web of conjecture which a world constitutional lawyer could weave around such beginning of an era of humanity as a constitutional purpose.

Proposal to Give World Legislature and Courts Powers to Create New "Constitutional Rights"

The Preamble, moreover, is followed by a Declaration of Duties and Rights, where we get a perhaps clearer idea of what the Committee had in mind. This Declaration is in the modern style. Whereas the Bill of Rights in the Constitution of the United States speaks in terms of guarding the individual against interference by a government always in danger of becoming arbitrary, tyrannical and unjust, so that the "freedoms" prescribed therein are political and the protections are against government, this draft constitution puts first emphasis on economic or social "freedoms", which is really a rather drastic redefinition of freedom in its constitutonal context. The great impetus which the late Roosevelt gave to this notion, by including among the "four freedoms" those of "freedom from want" and "freedom from fear", is here contained and elaborated. Among the specific freedoms: In paragraph B, this Declaration states first "the right of everyone everywhere to claim . . . for himself . . . release from the bondage of poverty . . . with rewards and security according to the merits and needs". Then follows "freedom of peaceful assembly"; and after that two clauses of distressing generality: "It is the right of everyone to claim protection of individuals and groups against subjugation and tyrannical rule, racial or national, doctrinal or cultural, with safeguards for the self-determination of minorities and dissenters; and any such other freedoms and franchises as are inherent in man's inalienable claim to life, liberty and the dignity of the human person, and as the legislators and judges of the World Republic shall express and specify".

Some trouble-making features of the above clauses are very obvious. "Self-determination" has acquired a familiar Wilsonian meaning which it is the whole purpose of this constitution to deny or modify. Furthermore, the clause gives the world legislature or Courts power to create by statute or decision a new "right of man". This puts in doubt the status of "rights". The practical

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importance of expressing a right in the constitution, at least where amendment is reasonably difficult, is the trouble it takes to get rid of it, on the one hand, and its application within "state" jurisdictions on the other. If the states which make up the World Republic are to retain any areas of competence upon which the federal government cannot encroach, this provision is a serious inconsistency. But there is also a doubt as to whether a right created by statute or decision could be removed by the same means, or whether the intent is to give the legislature and Courts something analogous to a power of appointment which, when exercised, is to be read back into the original instrument.

Constitutions Which Promise Lavish Social Legislation as "Rights"

The formulation of the problem of constitutional rights which impressed the Committee is well expressed in an article, "The Bill of Rights in a World Constitution", by Gertrude S. Hooker, in *Common Cause* (November, 1947):

Concerning the Author: Ray Garrett, Jr., was born in Chicago, and attended public schools in Evanston, Illinois. He obtained his B.A. degree at Yale in 1941. His work in the Yale Department of International Relations was interrupted by the war, after three months. He spent four years in the Army as an officer in the Field Artillery, seventeen months of it in the European Theater in the 264th Field Artillery Battalion, First and Third Armies. He was released from active duty as a captain. At present he is until July 25 in the ORC Summer Camp Forsyth, at Fort Riley, Kansas. He is otherwise in his third year at the Harvard Law School at the age of twenty-eight, specializing in international law and relations.

> Whereas the American Bill of Rights is noticeably out-dated in its omission of social and economic provisions, many of the apparently progressive constitutions have fallen into the contrary error of promising lavish programs of social legislation which are difficult to implement.
>
> . . . In the western world . . . the problem is to restore freshness and vitality to these ancient ideals . . . When everyone is in favor of freedom and freedoms, the suspicion arises that the words are meaningless, and in bad taste. Hamilton was right in rejecting those "aphorisms . . . which would sound much better in a treatise of ethics than in a constitution of government".

If Alexander Hamilton was right, clearly the Committee is wrong.

This presumably authoritative commentary on the Committee's opinion seems further contradicted in the provisions of Articles 30 and 31, which are part of the "World Law". These articles would guarantee to everyone in the world what is spoken of as "social security"; namely, old age pensions, unemployment relief, insurance against sickness or accident, "just terms of leisure", protection to maternity and infancy, compulsory education through the age of twelve, and equal availability of higher education to all. In each case, communities and states unable to provide these things "shall be assisted by the federal treasury, whose grants or privileged loans shall be administered under federal supervision". Article 1 (1) would give the world federal government power to lay and collect taxes. Surely there are not enough incomes or undistributed profits in all the world, even if taxed at 100 per cent, to guarantee "just terms of leisure" to 450,000,000 Chinese, at the present state of the world's economy, and such a notion has no business in a constitution. This is an example of the promises of a lavish program of social legislation which it would be most "difficult to implement".

Here we see a basic error: The Committee being anxious that all these things should come to pass in the world of today or tomorrow, has thrown them all into the constitution. It is debatable enough whether a world government could wisely undertake such projects at any time in the foreseeable future; it is quite evident that such should not be made immediate constitutional "rights". It must not be made the constitutional duty of the World Republic to impoverish the United States and all the western states to pour their wealth down into a bottomless pit of providing social security for over two billion people, most of whom today, through their own efforts or lack of them, are barely above what we would regard as starvation. If the desire is that the world federal government do such things when, and as far as, feasible, it is enough that it be given the power, not a command enforceable by any individuals or groups everywhere. "Justice" must not be confused by false promises in a formulation of "rights".

A similar error infects the other "constitutional rights". However desirable, it cannot become a matter of constitutional right for all the world to be released from the bondage of poverty. No Court and no legislature and no executive can bring it about that so much goods will be produced and distributed forever. The law cannot ultimately govern the relation of men to matter. The law can to some extent govern the relation of government to men and of men to each other. That is the most a constitution should attempt. A Bill of Rights has done its task when it concerns itself with the relations of the individual toward the government, limiting the means which that government can take to reach its ends, and preventing supposed interests of the community from snuffing out altogether the opportunities and freedoms of the individual.

Scope of Proposed Jurisdiction of "Federal Republic of the World"

The Preamble names the proposed world government the "Federal Republic of the World". Article 2 states:

> The powers not delegated to the World Government by this Constitution, and not prohibited by it to the several members of the Federal World Republic, shall be reserved to the several states, or nations or unions thereof.

Aside from throwing considerable fog over the question of what units make up this federation and have this reserved or residuary power, these phrases suggest a federal system wherein certain powers are granted to a federal government which can act only to their extent.

Article 1, however, reads in part as follows:

> . . . jurisdictions of the World Government . . . shall extend to: (a) The control of the observance of the Constitution in all the component communities and territories of the Federal World Republic, which shall be indivisible and one; (b) The furtherance and progressive fulfillment of the Duties and Rights of Man in the spirit of the foregoing Declaration [of Duties and Rights] . . .

It is difficult to imagine something which the world federal government might wish to do which a moderately astute lawyer, armed with Article 1, the duties and rights enumerated, the beginning of the "era of humanity" of the Preamble, and the "World Law", could not fit into the framework of constitutional powers. The federal structure is an administrative device and local autonomy in any degree mere administrative convenience. This is the federal form with the "unitary" substance. Even if it be admitted that ideally there should be no constitutional limitations on the general government as against local governments, in the matter of general acceptability, a true federal system would seem as far as one can go. Under the most optimistic estimate it is all but inconceivable that the states of the world will, today, in one voluntary act, abandon their sovereignty more completely than did the thirteen American colonies. Nor is it really clear that they should.

Knotty Problems of Relative Representation and Voting Strength

Of all the issues involved in planning a world government, that of the

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Conference with Members of Congress in the Field of Business Law

■ Our Association's Section of Corporation, Banking and Mercantile Law and the Committee on Commerce, with other representatives of our Association, held a dinner conference with members of the Congress at the Metropolitan Club in Washington on May 17 to discuss informally some of the legal problems affecting business. The session was significant and useful at a time when the need is great for the utmost experience and care in the drafting of legislation so that it will express the intent of Congress beyond judicial misinterpretation.

■ The following members of Congress were present (those who are members of our Association being indicated with parentheses denoting the year they became such):

SENATORS: C. Wayland Brooks, of Illinois (1932), Chairman of the Rules and Administration Committee and member of the Appropriations Committee; Hugh Butler, of Nebraska, Chairman of the Interior and Insular Affairs Committee and member of the Finance Committee; Harry P. Cain, of Washington, Banking and Currency Committee, District of Columbia Committee and Public Works Committee; Arthur Capper, of Kansas, Chairman of the Agriculture and Forestry Committee and member of the District of Columbia Committee and Foreign Relations Committee; Forrest C. Donnell, of Missouri (1911), Committee on the Judiciary and Labor and Public Welfare Committee; Bourke B. Hickenlooper, of Iowa (1943), Expenditures in the Executive Departments Committee, Foreign Relations Committee and Rules and Administration Committee; H. Alexander Smith, of New Jersey (1913), Foreign Relations Committee and Labor and Public Welfare Committee; Clyde M. Reed, of Kansas, Appropriations Committee and Interstate and Foreign Commerce Committee; and Elbert D. Thomas, of Utah, Foreign Relations Committee and Labor and Public Welfare Committee.

REPRESENTATIVES: Ralph E. Church, of Illinois (1921), Appropriations Committee; Everett M. Dirksen, of Illinois (1944), Chairman of the District of Columbia Committee and a member of the Appropriations Committee; Ralph A. Gamble, of New York, Banking and Currency Committee and House Administration Committee; John W. Gwynne, of Iowa, Committee on the Judiciary; Clarence F. Lea, of California, Interstate and Foreign Commerce Committee; Earl C. Michener, of Michigan (1922), Chairman of the Committee on the Judiciary; Thomas L. Owens, of Illinois (1929), Education and Labor Committee; Chauncey W. Reed, of Illinois (1944), Committee on the Judiciary; Charles W. Vursell, of Illinois, House Administration Committee and Post Office and Civil Service Committee; Jesse P. Wolcott, of Michigan, Chairman of the Banking and Currency Committee; Charles A. Wolverton, of New Jersey (1924), Chairman of the Interstate and Foreign Commerce Committee; Edward J. Devitt, of Minnesota (1939), Committee on the Judiciary; John D. Dingell, of Michigan, Ways and Means Committee; William G. Stratton, of Illinois, Banking and Currency Committee; and John M. Vorys, of Ohio (1941), Foreign Affairs Committee.

President Tappan Gregory, Last Retiring President Carl B. Rix, Treasurer Walter M. Bastian, Secretary Joseph D. Stecher, Chairman Howard L. Barkdull of the House of Delegates, Editor-in-Chief William L. Ransom of the JOURNAL, Loyd Wright of the Board of Governors, and Frank E. Holman, unopposed nominee for President for 1948-49, were among those present for a time representing our Association. Former President George M. Morris attended throughout.

Benjamin Wham, of Chicago, Chairman; John W. Kearns, of Chicago, Vice Chairman; and William B. Cudlip, of Detroit, Secretary of the Section, and other members of the Section Council and Chairman of its Committees were present. L. Duncan Lloyd, of Chicago, Chairman, Harold J. Gallagher, of New York, William T. Faricy, of Washington, and William W. Gibson, of Minneapolis, represented the Committee on Commerce.

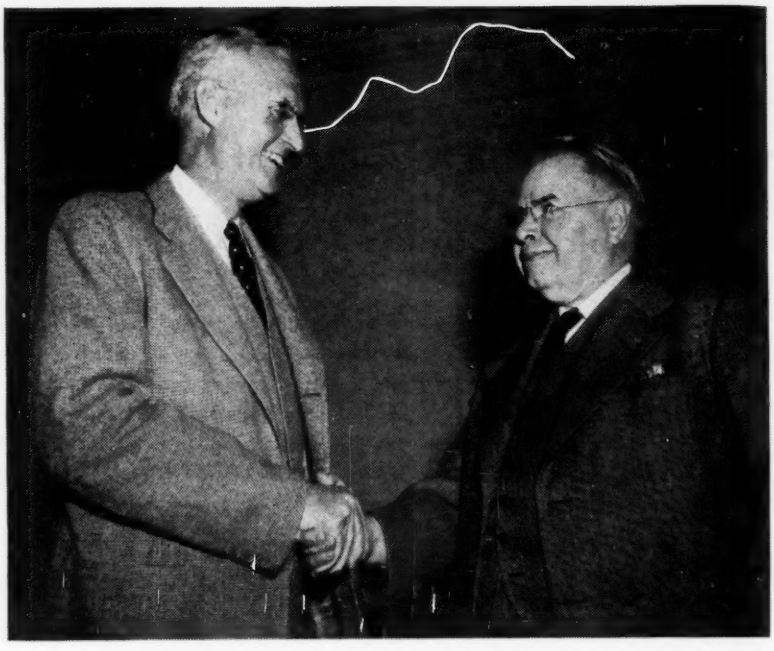
In opening the discussion Chairman Wham limited speakers to fifty-nine seconds. This rule was applied strictly to spokesmen of the Section and Committee. Former Congressman Walter Chandler, of Memphis, Chairman of the Section's Division of Reorganization and Bankruptcy, Frank Olive, of Indianapolis, J. Francis Ireton, of Baltimore, and Milton P. Kupfer, of New York, spoke of some legislation pending before the Judiciary Committees. Messrs. Lloyd, Gallagher, Faricy, and Robert E. Quirk, of Washington, told of some of the legal problems in the field of interstate and foreign commerce. Messrs. Kearns, Cudlip, D. J. Needham, of Washington, and Malcolm Fooshee, of New York, outlined cur-

rent legislative problems in the fields of banking, currency and finance.

Responding and commenting as members of the Congress, Senators Donnell, Reed and Butler paid high tribute to the experienced and public-minded work of our Association in the field of business law and in other fields, including advice in the selection of candidates for federal judicial office.

Congressmen Michener, Reed, Wolverton and Wolcott expressed appreciation of the expert assistance given by the Committees and the Section, and other spokesmen for the Association, on bills pending before their respective Committees. Congressman Wolcott pointed out that the traditional policy of our country favors freedom of private enterprise and opportunity for our citizens, and he declared that the Congress is fully in accord with this policy.

The meeting closed with a toast proposed by Senator Brooks to the continued cordial relationship between the Congress and our Association for promoting and safeguarding the public interest through legislation.



JESSE P. WOLCOTT (right), Michigan Congressman; Chairman of the House Committee on Banking and Currency; winner of *Collier's* magazine award for 1946 for constructive legislative service (see 33 A.B.A.J. 1135; November, 1947). With him at the Metropolitan Club in Washington is Benjamin Wham, of Illinois, Chairman of our Association's Section of Corporation, Banking and Mercantile Law.

Organic World Law Held Needed to Safeguard Free Government and Basic Rights

■ "Federal Judge Robert N. Wilkin's words, spoken and written, in the last three years on behalf of the world's need for a constitutional law system are familiar to thousands of Clevelanders by now. His persistence has aroused the admiration of many of us, likewise the simple dignity of the arguments he makes.

"For the magazine *Freedom & Union*, Judge Wilkin has just done a survey of new nationalistic constitutions being born in these years—in Japan, Brazil, Germany, Italy, India, and other new republics. In it he shows his philosophical relish for the birth of constitutional, that is to say, contractual, provisions to safeguard human rights and representative government and to erase class and race distinctions (as in India). He pounds home the axiom that it is only by popularly-accepted contracts, in writing, enforced in law, that we ever do achieve these steps ahead—that law is what has made them come into being.

"If this seems to any like an old truth, bear in mind that the UN has been reluctant about committing international relations to law, and that such law today would have cured the deficiencies and mistakes made in our years since the UN was born. International law, had it been accepted and undertaken by the participating nations, would have cured the UN veto trouble and would have halted the frustrating war in the Near East before it started; just as police cure and halt similar community troubles because they are backed up by law.

"Judge Wilkin can feel complimented that the U. S. State Department saw his article and is now distributing it, as part of the official American propaganda and news service in Europe, Latin America, the Middle and Far East, and Africa, and will offer it for republication to periodicals in Germany, Austria, Trieste, Japan and Korea."

—Editorial in the Cleveland *News*, June 7, 1948.

"Books for Lawyers"

THE MEMOIRS OF CORDELL HULL. *New York: The Macmillan Company. 1948. $10.50. (2 vols.). Pages xii, 916; vi, 919-1804.*

With the exception of the first twelve, the 124 chapters of Cordell Hull's massive *Memoirs* deal with the foreign relations of the United States during the twelve-year incumbency of Mr. Hull as Secretary of State from 1933 to 1945. Since the official volumes on *The Foreign Relations of the United States* have been published only down to the year 1933, Mr. Hull's *Memoirs* will provide a practically official substitute for many years to come. It is unfortunate that few important documents are printed verbatim in the *Memoirs,* but it is understood that the lengthy paraphrases and summaries of diplomatic negotiations have been carefully checked in the Department of State.

The scope and range is immense; the detail always sufficient to give the official defense of any particular policy or action. Indeed, a large amount of space is given in the two volumes to the defense of administration policies which had been subjected to severe criticism. For example, Mr. Hull recapitulates with withering scorn and in tedious detail his fight to break down "legislative" neutrality and to secure for the United States (in the name of self-defense) freedom of action from the restraints of international law. Passages in the book confirm the suspicion that Mr. Hull never has understood the purpose or legal implications of a policy of neutrality. The consecrated tones in which he customarily refers to international law never deprive him of a ready defense for the Roosevelt administration when it played fast and loose with any particularly inconvenient principle of international law. Careful students of this aspect of the Roosevelt policies will wish to check the *Memoirs* against Charles Beard's *President Roosevelt and the Coming of the War, 1941—A Study in Appearances and Realities.*

Similar justifications of the appeasement policies towards Vichy and Franco Spain are set forth, although Mr. Hull is wrathful against those who favored appeasing Argentina. Mr. Hull appears in these pages as a valiant fighter, tilting lances on occasion with Churchill, Eden, de Gaulle, Morgenthau, Welles, Pittman, and a score of others. Opponents of his views frequently receive less than their due, and popular criticism is sometimes attributed to "warplots".

Until the Roosevelt papers are available to historians it may be impossible to measure the extent to which Mr. Hull initiated or influenced foreign policy during his tenure as Secretary of State. The impression which these pages seek to convey is that Mr. Hull had a determining hand in many policies usually attributed to others. On one point the record is clear: Mr. Hull usually saw eye to eye with his "Chief," but an interesting case to the contrary was in the issue of regionalism versus a general international organization as the basis of the United Nations. Roosevelt, Churchill and Welles favored powerful regional organizations with decentralized specialized agencies. In one of the most valuable parts (Part 8) of his book, Mr. Hull cogently marshals the arguments by which he succeeded in convincing Roosevelt, Churchill and Stalin of the desirability of establishing the United Nations as a strong centralized organization with a limited role for regional organizations. Although Mr. Hull was too ill to attend the San Francisco Conference, the structure of the United Nations bears the unmistakable label "Made in America" and attests the years of study carried on under Mr. Hull's supervision in the Department of State.

The Trade Agreements program will always be associated with the name of Cordell Hull. To Mr. Hull also goes the credit for the skillful handling of relations between the State Department and Congress and for the establishment of a bi-partisan foreign policy during the later war years. Although Sumner Welles is usually regarded as the initiator and administrator of the Good Neighbor policy, Mr. Hull's account of his diplomacy at several Pan-American conferences are not the least valuable part of his book.

Hitherto unpublished nuggets of information will be garnered by diplomatic historians from these volumes with avidity. The general reader will find a fascinating account of Mr. Hull's frontier days in Tennesee as lawyer, judge and legislator, as well as the semi-official defense of the Roosevelt foreign policies. All will pay tribute to a high-minded and faithful public servant who took pride in describing himself in the *Congressional Directory* as "a lawyer by profession".

HERBERT W. BRIGGS
Ithaca, New York

CIVILIZATION ON TRIAL. *By Arnold J. Toynbee. New York: Oxford University Press. 1948. $3.50. Pages vii, 263.*

This book brings us face to face

with the tragic issue of our era and enables us to see it in the full perspective of history. The late Thomas F. Woodlock, of the *Wall Street Journal,* said that the trouble with the present generation is that "They've never read the minutes of the previous meeting"; and C. P. Ives, of the Baltimore *Sun,* has remarked that too many of our opinions are improvised "as if history began yesterday". Professor Hugh Last, of Oxford, England, has declared: "There are tendencies about which bode trouble—not because the people who show them are evil but because they don't understand the fundamental facts of their own civilization." In this little volume Toynbee makes available to us the results of his extensive and profound studies, without requiring a consideration of the dates and details of history. If read with understanding, it is an absolute cure for our provincialism—our parochialmindedness, as he calls it.

The book is a collection of thirteen essays written at different times. They may be read separately, but a common thesis extends through them all and gives them unity. The author has a delightful style of expression, as readers of the author's *A Study of History* in the abridgement by Somervell well know. This volume is intended for the general reader and is more intimate and current in its appeal. The author has a remarkable gift for illustrative similes and historical parallels, but he never allows the development of his similes to carry him too far. He says:

> These metaphorical applications of the processes of inanimate nature to the delineation of life, and particularly human life, are perhaps peculiarly dangerous nowadays just because they are so much in fashion. Not so long ago, the danger was all the other way. We used to think of the processes of inanimate nature anthropomorphically, and the progress of physical science was seriously hindered until this anthropomorphic, mythological habit of looking at physical nature was broken. We have, I think, broken it effectively. In our physical science, we are thoroughly on our guard nowadays against the so-called "pathetic fallacy". But perhaps, in extricating ourselves from the "pathetic fallacy", we have fallen unawares into an opposite "apathetic fallacy"—which is every bit as fallacious. We tend, because this feels and sounds "scientific", and because science nowadays enjoys prestige, to think and talk about human beings as though they were sticks and stones and about life as though it were a stream of radiation or a constellation of protons and electrons. This may be a convenient simile, but it is, I am sure, a false route. Let us step out of this rut and set ourselves to think and speak of human civilizations in human terms.

Toynbee's scope of vision is majestic. He sees humankind in a continuous movement through time and space. He does not deal with persons, battles, dynasties, or nations, so much as with civilizations. He tries to discover and delineate the causes of the rise and fall of these great spiritual movements. Although he searches the centuries, he brings his conclusions to bear upon the essential problems of our "time of troubles". He tries to discover the road we must take if our civilization is to be saved from disaster. Speaking of Greek civilization, he says:

> So long as the economic life of each city-state remained parochial, they could all still afford to be parochial in their political life as well. The parochial sovereignty of each city-state, *vis-a-vis* every other, might and did breed perpetual petty wars, yet, in the economic circumstances of the age, these wars were not deadly in their social effects. But the new economic system, introduced by the Attic economic revolution under the spur of the stoppage of Greek colonial expansion, was based on local production for international exchange. It could only work successfully if, on the economic plane, the city-states gave up their parochialism and became interdependent. And a system of international economic interdependence could only be made to work if it could be brought within the framework of a system of international political interdependence: some international system of political law and order which would place a restraint upon the anarchic parochial sovereignty of the local city-states.

He concludes his survey of Graeco-Roman civilization thus:

> My conclusion is that we should look at this story as a whole. It is only when it is viewed as a whole that it throws its light upon our own situation in our own world in our day. But, if one does succeed in obtaining this light from it, it proves, *experto crede,* to be most amazingly illuminating.

The author believes that "It is a foregone conclusion that the world is in any event going to be unified politically in the near future". He says: "I think the big and really formidable political issue today is, not *whether* the world is soon going to be unified politically, but in which of two alternative possible ways this rapid unification is going to come about." In times past, he points out, some great power "knocked out" its competitor and imposed temporary peace on the world by conquest. The *Pax Sinica* in the Far East and the *Pax Romana* in the West are illustrations of the "knock-out" method. But he sees the world now engaged in a "new experiment in a co-operative government of the world". He says: "It is evident that we are engaged here on a very difficult political pioneering enterprise over largely unknown ground." He concludes:

> If this enterprise did succeed—even if only just so far as to save us from a repetition of "the knock-out blow"—it might open out quite new prospects for mankind: prospects that we have never sighted before during these last five or six thousand years that have seen us making a number of attempts at civilization.

Toynbee is not without hope. He gives emphasis to the spiritual and moral forces in life. He sees a possibility of Christian countries being affected by Islam's racial tolerance and avoidance of alcohol. But mainly his hope rests upon Christian principles. He believes it possible for this world, even though not perfect, to become a province of the Kingdom of God—a province "in which spiritual action could, and would, be fully significant and worth while: the one thing of manifest and abiding value in a world in which all other things are vanity."

ROBERT N. WILKIN
Cleveland, Ohio

BERRY AND LINCOLN, FRONTIER MERCHANTS: *The Store That "Winked Out". By Zarel C. Spears and Robert S. Barton. New*

York: Stratford House, Inc. 1947. $3.75. Pages 140.

The persistence of the Baker Street Irregulars in filling the lacunae in the career of Sherlock Holmes is equalled only by that of Lincoln enthusiasts in exploring every phase of the life of the Emancipator. In the one case fiction is dressed as fact; in the other, fact is frequently adorned with fiction. Being a Lincolnite, I was always interested when my old friend Harry Spears of the Memphis Bar repeated to me the stories he had heard his grandmother, Harriet Berry Spears, the sister of William F. Berry, tell of the venture her brother and Lincoln made in storekeeping at New Salem, Illinois. I was pleased, therefore, when Harry's brother, Zarel C. Spears, wrote me that he was sending me an autographed copy of this little volume. That pleasure was enhanced by reading the book, for it is one that no lover of Lincolniana should neglect.

Mr. Spears and Mr. Barton have based their account upon "existing documents and other credible evidence", and are careful to distinguish provable facts from conjecture, no matter how reasonable. The story they tell is not only of "the store that 'winked out' ", but of all of Lincoln's activities at New Salem as storekeeper, deputy surveyor, postmaster, State legislator. Moreover, the short life of Berry is fully recorded, so far as the facts can be replevined from records and authentic recollections.

Not much new light is shed on Lincoln. He is shown to have been—as is generally known—not entirely provident but somewhat careless in signing notes as maker and accommodation endorser—a habit which resulted in several judgments against him.

Lincoln himself tells of buying for half a dollar, from one "who was migrating to the West", an old barrel, and finding in it "at the bottom of the rubbish a complete edition of *Blackstone's Commentaries*". He became "intensely interested" in reading the *Commentaries* and spent more time doing this than in attending to the wants of the few customers who came into the store.

The authors refute at length the legend that Lincoln objected to the sale of liquor in the store and that because of this disapproval, he dissolved his partnership with Berry. Their conclusion that Lincoln, as well as Berry, actively participated in this phase of the business is supported by such records as exist and is consonant with the probabilities. Then no federal liquor license was required and the traffic was regulated only by the States. In Illinois, liquor was a usual article of merchandise in stores; no tax or license was required for sales of one gallon or more, but a license fee had to be paid and a bond given by those who sold whiskey by the drink. In addition to the operators of "groceries"—the frontier name for "groggery"—whose sole stock in trade was liquor, many general storekeepers met these requirements, as did Lincoln and Berry. It was this distinction between "store" and "grocery" which enabled Lincoln truthfully to say—in denying the charge of Douglas—that he "never kept a 'grocery' anywhere in the world". Indisputable records are adduced to show that Lincoln signed the bond prescribed for retail sales, and a persuasive showing is made that he never objected to this part of the partnership business.

The authors are chiefly concerned with proving that "William F. Berry is the most maligned man in the whole Lincoln saga". Some Lincoln biographers have stated that Berry was "a thriftless soul" and a "trifling man", that he became insolvent, and that his obligations were assumed by Lincoln, who sometimes referred to them as "the national debt". The testimony related, however, seems to indicate that, while Berry and Lincoln had financial difficulties both individually and as partners, it was Berry and not Lincoln who furnished the greater part of the assets and most of the credit.

Lincoln was unquestionably a teetotaler, but it has been repeatedly declared that Berry spent more time in consuming liquor than he did in selling it. Lamon says that "Berry had no qualities which atoned for his evil habits". Nicolay and Hay write that "Berry expired, extinguished in rum", and Lord Charnwood repeats that "Berry then died of drink". There is a Sangamon County tradition that at Berry's funeral his father delivered a temperance lecture in which "he spoke only of his son's death as the inevitable climax of a dissipated life".

Not much positive evidence is pointed to which tends to prove that Berry was the superior young man the authors picture him to have been, but a convincing argument is made that there is nothing to support a contrary conclusion. It is stated that "there is no known evidence that Lincoln ever mentioned in later years the name of William F. Berry", and it is insisted that this "fact has no special significance, since that is equally true of a score of others who were his friends and companions during the six years of transition from rustic boyhood into maturity". Perhaps. Perhaps, also, Lincoln by his silence was drawing the mantle of charity over the frailties of his friend. The impossibility of arriving at any definitive solution of a problem like this is one of the fascinations of Lincolniana.

WALTER P. ARMSTRONG
Memphis, Tennessee

SUBROGATION UNDER WORKMEN'S COMPENSATION ACTS. *By William B. Wright. New York: Central Book Co. 1948. $7.50. Pages xxxiii, 161.*

A point on which the Bar and industry might agree is that the development and enactment of workmen's compensation laws in the various States have proved one of the most salutary steps for both. Although every State now has such an Act,[1] they differ widely in their application, and particularly in the provisions for the recovery by the employer of the amount paid as compensation from a third person whose negligence

1. Mississippi was the last State to adopt such legislation, enacted during the current year and too late to be considered in the present volume.

caused the injury. Mr. Wright has performed a valuable service, to lawyers and to legislators, by compiling this first study in the field of the comparative subrogation provisions of the various workmen's compensation laws. His position as acting chief attorney for the Federal Security Agency, Bureau of Employees' Compensation, qualifies him for such a task.

Mr. Wright's method of dealing in a brief space with such a vast amount of material is to draw parallels between the laws of the States on the subject, and then in the text to attempt to deduce the generalities, coordinating both the majority and minority rules with actual decisions by means of full footnotes. Not the least valuable feature of the book is an analytical table summarizing the subrogation provisions of each State and Territory, and an appendix in which these provisions are set forth in full. Collection of this material in a convenient form should prove helpful to counsel for insurance companies which write compensation insurance in numerous States.

But the chief interest of the book to the average lawyer is to emphasize the many problems and discrepancies which still exist in the law of workmen's compensation. If the employer is completely subrogated to the employee's rights, and sues in his name or its own, what disposition is to be made of the amount recovered? Mr. Wright points out that the modern tendency is to be more liberal towards the employee, and that in Arkansas and Wisconsin he is entitled to receive one-third and in New York two-thirds of the net recovery. Should contributory negligence on the part of the employer bar his right to recover from a third party under the subrogation feature of the act? The decisions have gone both ways. Does the acceptance of compensation under acts providing for an election bar a subsequent action against an attending physician for malpractice aggravating the injury? Again there are cases on both sides. These are only a few of the problems which deserve the consideration of the Bar, and which sooner or later must be definitely settled. Perhaps uniform legislation is indicated; perhaps as the law of workmen's compensation develops, the Courts will bring the decisions of the States into line. In any event the present work is an admirable preliminary study which should prove of interest and great help in any consideration of its subject.

WALTER P. ARMSTRONG, JR.
Memphis, Tennessee

LINCOLN AND THE WAR GOVERNORS. *By William Best Hazeltine. New York: Alfred A. Knopf. May, 1948. $4.50. Pages 405.*

The scene of the climax of this book's theme is the battlefield at Gettysburg on November 19, 1863. Little more than four months before, the hills and farms have been drenched with the blood of brothers, in the three days of struggle so vividly described in the words of onlookers and participants in the volume which Earl S. Miers and Richard A. Brown have recently edited for the Rutgers University Press. The occasion of the November assemblage was the dedication of a part of that battlefield "as the final resting-place of those who here gave their lives". Governor Curtin of Pennsylvania had brought about the gathering to glorify what the States and their "War Governors" had done to win the war in which the tide had turned against the Confederacy at least since Antietam and Gettysburg. State standards and flags were everywhere in conspicuous places; parts of the field were identified with the State troops who fought there; Curtin and the other Governors were on hand to receive the acclaim. The orator of the day was the renowned Edward Everett; the President of the United States was to speak briefly.

Abraham Lincoln had been elected in 1860 on a platform which pledged that the "rights of the States must and shall be preserved". His party had been a loose fusion of State groups, each dominated politically by its Governor. They were strong and experienced men, with public opinion in their States behind them. Collectively, they believed that they had elected the "prairie lawyer" and had a right and duty to dictate the policies of what was left of the Union. When Lincoln asked for troops, the response and the quotas were by States, with the Governors in charge and the regiments bearing proudly the names and flags of their States. When Lincoln did not accept and follow all of their advice, the Governors met at Providence and at Altoona to criticize the President and demand that he replace McClellan with Fremont.

If the able lawyers among the militant Governors could have rewritten Lincoln's speech for that day, some of its classic phrases would have read something like this:

> Four score and seven years ago, our fathers brought forth on this continent a new federation of sovereign and indestructible States. . . Now we are engaged in a great civil war, testing whether that federation, or any federation so conceived and so dedicated, can long endure. . . It is for us, the living, to be here dedicated . . . that we here highly resolve . . . that this federation of States, under God, shall have a new birth of freedom—that government of the people, by the States, for the people, shall not perish from the earth.

Instead the Illinois lawyer spoke of and for "the Nation" in suitable words which profoundly affected our history and will never die. Public opinion rallied to his cause. Professor Hazeltine shows that within a year from Gettysburg, adroit politics and masterful leadership had enabled Lincoln to transform his fighting forces into a truly national army; and in the 1864 elections the candidates for Governor in the Northern States were eager to run on his platform and obtain his indorsement as a great source of vote-winning strength.

The events which this book depicts show in short that the Union of States was "consolidated" and made beyond challenge a nation by forces and factors which were not in Marshall's opinions and did not depend on the roar of Grant's guns. Structures of government can be trans-

formed by public opinion and by the logic of events, made clear by an inspiring leader. Although that was hardly his primary purpose, Professor Hazeltine's work places a probably accurate emphasis on Lincoln's skill as a political organizer, his capacity for leadership of public opinion, and his own clear vision that the "erring States" should return as integral parts of a united nation.

W.L.R.

A UNION OFFICER IN THE RECONSTRUCTION. *By John William De Forest; Edited by James H. Croushore and David Morris Potter. New Haven: Yale University Press. 1948. $3.75. Pages xxviii, 211.*

J. G. Randall in his *Lincoln and the South*[1] writes that ever since Appomattox tolerance for the South's viewpoint has grown. Professor Randall was speaking in part of the self-redemption of the South from the evils of Reconstruction and of the general acceptance, if not of all the means employed, of at least the result achieved. Indeed, until recently it seemed that upon no era of our history was the judgment of history more nearly definitive. The Lincoln-Johnson plan of speedily readmitting the States that had attempted to secede was placed on a high level of statesmanship; Thaddeus Stevens and his fellow Radicals were consistently excorciated for their politically motivated action in turning the South over to plundering carpetbaggers and scalawags.

If one may judge by current indications, some of these conclusions and related conclusions of broader import are about to be challenged, if not by historians, at least by politicians and vote-seekers. If as a part of the attempt at a new Reconstruction of the South there is to be a reconsideration of the wisdom of the old Reconstruction this book is virgin source-material for the debate. None of the well-known writers on Reconstruction—James Ford Rhodes, Woodrow Wilson, W. A. Dunning, Claude Bowers—mentions De Forest, although his is a first-hand and in many respects important account by an impartial Northern observer.

John William De Forest was a "Bureau Major"—an official detached from the Union Army for service as an agent of the Freedmen's Bureau—who had no sympathy with what he called the "grand hocus-pocus of the Confederacy". He was stationed at Greenville, South Carolina, for fifteen months in 1866 and 1867. As the editors say, he had "an unusual gift for vivid, accurate, perceptive factual reporting".[2] His comments were published at the time or soon after in leading magazines,[3] and were collected and edited by him preparatory for book publication, which until now was never made.

De Forest was a native of Connecticut; he became a professional writer and reached his prime in the period known as New England's Indian Summer. "He wrote in a vein distinctly his own, so direct, so stripped of delusion, so trenchant in its perceptions, that it forfeited the approval of a sentimental public."[4]

When De Forest arrived at Greenville, he was not unacquainted with South Carolina. His father-in-law, Charles Upham Shepard, a cousin of Ralph Waldo Emerson, had served as professor of chemistry in the Medical College at Charleston, and with him in 1856 and 1857 De Forest and his wife lived. After the De Forests returned to Connecticut, they made frequent visits to Charleston and in fact sailed north on the last steamer to leave before the fall of Fort Sumter. De Forest left Greenville in 1867 and did not witness carpetbag government[5] or that by former slaves. Moreover, Greenville is in the piedmont section of South Carolina and conditions there were not entirely typical of those in either the low country of South Carolina or in the Deep South.

With due allowance for these facts, De Forest's work remains an important historical document in two respects—in its report upon the activities of the Freedmen's Bureau and in its keen analyses of the characteristics of the white and black races in the South.

The third "Freedmen's Bureau Bill" (1866) stipulated that the Bureau officers should "extend military protection and have military jurisdiction over all cases and questions concerning the free enjoyment of . . . rights and immunities". De Forest had charge of three large counties which he called his "satrapy", with not even a corporal and a squad of men to support him. He was required to supervise labor contracts, to administer rations and clothing to the destitute freedmen, to promote and supervise schools for the Negroes, to investigate disputes between the Negroes themselves or between Negroes and whites, to forestall any acts of violence against the Negroes or any unfairness to them in the Courts, and to maintain industry and good conduct among the Negroes themselves. It was a difficult and in some respects an impossible task. De Forest vividly reports concrete cases. The credulous Negroes by their absurd applications to him demonstrated how pathetically ill-prepared they were for freedom. Blame for disputes between Negroes and whites is assessed about equally.[6]

The remarkable thing is that in all cases De Forest was able to resolve these controversies by realistic advice or with the aid of the South-

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1. Reviewed in 32 A.B.A.J. 415; July, 1946.

2. The introduction written by the editors is an excellent critical essay which includes a brief biography of De Forest, an appraisal of his writings, and a complete background for this volume.

3. *Harper's Monthly, Atlantic Monthly* and *Putnam's Magazine.*

4. Of De Forest's other books, a novel, *Miss Ravenel's Conversion from Secession to Loyalty,* was reissued in 1939; and *A Volunteer's Adventure,* his personal record in the War Between the States, was belatedly published in 1946.

5. "Of carpetbaggers . . . we had none in Greenville. . . . It is a pity that revolutions, even the noblest of revolutions in cause and effect, will fling so much scum to the surface." (page 172)

6. "Honesty bids me declare that, in my opinion, no more advantage was taken of the freedmen than a similarly ignorant class would be subjected to in any other region where poverty should be pinching and the danger of starvation imminent." (pages 73-74)

"New York City would be fortunate if it could have justice dealt out to it as honestly and fairly as it was dealt out by the plain, homespun farmers." (page 31)

ern civil authorities who fully cooperated with him. Here again De Forest was not a typical Bureau officer, for a Northern authority[7] has stated "the probabilities are that half the aggregate number on duty at any given time are wholly unfit for the work entrusted to them". If all Northerners who came South after Appomattox on official and personal missions had been of the caliber of De Forest and if Stevens and his wrecking crew had withheld their hands, the nation would have been spared much of disgrace and tragedy. De Forest says "one wonders that the South did not rebel anew when one considers the miserable vermin who were sent down there as government officials". His judgment on emancipation is that "it was a mighty experiment, fraught with as much menace as hope," which brought the Negro race "to sharp trial before its time".

In some ways De Forest was unduly pessimistic as to the future of the colored race. He tells of the first Negro witness permitted to testify in his "satrapy", with seeming misgiving as to whether in the future the testimony of colored witnesses would be accepted. Long trial experience convinces me that before Southern juries no testimony is more acceptable. The ordinary Negro witness is naive. His interest or impartiality is easily detectable. He delivers his testimony with an originality of expression, a freshness of metaphor, and an absence of personal opinion that are refreshing.

As juror and elector the colored man falls more nearly within De Forest's pattern. On juries Negroes are always in the minority, and usually vote with the white majority. But if one of the attorneys is fortunate enough to select one who has been a family servant or who has been his waiter or barber, woe to the adversary; here is a juror whom neither the argument of counsel nor admonitions of the judge can move. There is always danger in the ease with which the colored vote can be manipulated by designing politicians.

De Forest's chief criticism of the freedmen relates to temperance, chastity and honesty. Either his strictures are too severe or the race has greatly improved. De Forest himself notes that the freedmen were more honest than the slaves. He seems to consider the failure to distinguish between *meum* and *tuum* a racial characteristic. Today certainly that is not true, as thousands of Southerners whose servants carry the keys to their homes will testify.

On the part of both blacks and whites De Forest thought that the wide prevalence of private charity discouraged thrift. He found an almost universal tendency to permit the shiftless of both races to be supported by the provident. This attitude of the white man, my Northern secretary recently reminded me, is a disservice to the underprivileged of both races.

Looking ahead De Forest prophesied: "The acceptance of the Negro as the social equal of the white in our country dates so far into the future that, practically speaking, we may consider it as never to be, and so cease concerning ourselves about it. . . . There will be no amalgamation, no merging and disappearance of the black in the white, except at a period so distant that it is not worth while now to speculate upon it". His advice was "that the freedmen may be moderate in their claims and grow up with some meekness into their dignity of citizens".

De Forest's description of the Southern whites of his day is discriminating and today needs little revision. There were those whom De Forest called "chivalrous Southrons" with the advantages of tradition and breeding, responsive to the challenge of *noblesse oblige*, genuinely courteous, hot-tempered and personally courageous.[8] On the lowest level were those who in Greenville District were called "the low-down people" and elsewhere "the poor whites".

De Forest had little faith in the typically Northern hope that these underprivileged could be reclaimed, and described the type with a frankness that bordered on contempt: he probably underestimated the handicap that slavery had long imposed on these people for, since it has been lifted, there has been among them, as among the colored race, a great improvement. Neatly painted cottages on paved highways are rapidly replacing the squalid hovels on "Tobacco Roads".

It seems unlikely that there will be any rehearing of the unanimous judgment already entered upon the first Reconstruction; but if there is, De Forest will be an independent witness whose testimony will be clear, cogent and convincing. And he supplies a great deal of background for present understanding of all that has taken place, and the marked gains that have been made, since the dark days in which he lived and of which he wrote.

WALTER P. ARMSTRONG
Memphis, Tennessee

7. Sidney Andrews.

8. "They certainly are, these 'Southrons', a different people from us Northerners; . . . they are more simple than we, more provincial, more antique, more picturesque; they have fewer of the virtues of modern society, and more of the primitive, the natural virtues; they care less for wealth, art, learning, and the other delicacies of an urban civilization; they care more for individual character and reputation of honor." (page 173)

"Yes, it is a sensitive quality, this self-respect which has grown up in the solitude of great plantations and the quiet of small towns; it can not bear the dense crush of a busy world and is especially hurt by the friction of a hurried democracy. These things rub the down off its wings and make it sore and angry and miserable. Where it can have consideration it is gentle and charming; where it can not it is pugnacious or sullen, and socially inconvenient. (page 176)

"The pugnacious customs of Southern society explain in part the extraordinary courage which the Confederate troops displayed during the Rebellion. . . . They went into battle with the same moral superiority over their Northern antagonists which a border militia has over an urban militia; which, for instance, the Highlanders of Prince Charles Edward, habituated to the dirk and claymore, had over the burghers of Edinburgh; a superiority resulting from familiarity with the use and the effect of weapons.

"But this was not all: there was also the power of patrician leadership; there was also the sense of honor. The Southern troops were officered in the main by the domineering, high-spirited gentlemen who governed them in time of peace; and they were fired by the belief that the greatest glory of humanity is not learning, not art, not industry, but successful combat.

"Even this was not all: they were defending their own native soil; they were stimulated by a long-cherished hate and encouraged by a carefully inculcated contempt for their antagonists." (pages 183-84)

THE LIFE OF ROSCOE POUND. *By Paul Sayre. Iowa City: College of Law Committee, State University of Iowa. 1948. $4.50. Pages 412.*

Probably no two men who know well the many-sided Pound would write the same kind of a biography of him. There have been so many phases and facets of his life and work that each biographer would find ample grounds for a delineation and emphasis derived from himself rather than compelled by his subject. To many in all lands Pound is the world's foremost legal philosopher and jurisconsult—an ageless statesman and builder of a modern juridical philosophy that is not limited to one country, one generation, or one legal system. To many others Pound is a towering figure and force as a legal reformer, a valiant crusader who has done more than any other for improving the administration of justice in practical ways and at the same time has resisted staunchly the infiltrations of improvised concepts and ideologies which would destroy certainty and justice in the law.

To those who drew inspiration and perspective from him in his classrooms, and probably also to the largest number of his countrymen, Pound is the best known and best loved of American teachers of law. To many of us who as practicing lawyers have worked closely with Pound in the American Bar Association, Pound is all of these things, and more, but first and most of all he has seemed to us a lawyer with the practitioner's approach to problems of law and legislation—truly an American lawyer who came up the hard way from the Nebraska plain, worked much more intensely than the rest of us, acquired vast knowledge and master skills, devoted himself tirelessly to great tasks for the profession and the public, received modestly the honors and homage of the profession in his country and the world, and yet never ceased to be in heart and mind and methods an all-around lawyer, who could have gone on to first rank in the practice of his profession and would have been one of our finest judges had he been chosen for our highest Court. Above all, Pound is to me an intensely human and companionable person—with an infinite capacity for good cheer; good sense, and good fellowship wherever he may be, at a Bar Association meeting, or on the high seas or in foreign climes.

Professor Sayre has not written a formalized portrayal, and he does not seem to me to have committed himself to any imbalance of emphasis. He has performed with zeal and fidelity what was to him, manifestly, a labor of love and admiration, and he has rendered an invaluable service in searching the memories of many men and putting their recollections in a lasting form while they are still alive, and also in obtaining access to much correspondence that throws light on Pound's personality and career at its varied stages. Interspersed with this vividly human source-material is the author's own portrayal of the beloved mentor whom he knows so well and holds in such high affection. While I cannot regard this as the objective or the ultimate biography of Pound, Professor Sayre has assembled and preserved much of the material from which future appraisals will best be made.

The thousands of young men who studied under him will be glad to have this book and will enjoy it, because Professor Sayre naturally has written much of Pound as a teacher, in Nebraska and in Chicago and at Harvard. Those of us who have worked with Pound in some of the many tasks to which he devoted himself with such tireless industry and consummate skill will find much in this volume that brings back recollections of stirring days and nights. Those who wish to study the mutations in law and legal theory, during the past forty years, and to read the story of the long struggle to improve the administration of justice in the Courts and the governmental agencies, will find in this book a fruitful text.

Professor Sayre seems to me to write with an understandable zeal or sense of mission to accomplish an objective which may perhaps be stated in this way: Because Pound's career and work has extended over so many years and has had so many localities and differing phases, Professor Sayre is concerned that there be recorded a well-rounded picture of Pound and of the latter's whole thinking—a complete system of the consistent thought and action of a jurist and legal scholar engaged day-by-day in dealing with realities and exigencies as they from time to time arose in the interplay of ideas and events during a time of change. "Pound's thought is not just his thought at a certain date", says Professor Sayre, who has succeeded well in bringing together the manifestations of a complete and consistent juridical philosophy which is not limited in applicability to one issue, one time, one country, or one contest for law and justice against arbitrary power and against improvised motivations for judicial decisions.

For us who knew and worked with Pound mostly in the American Bar Association and on the very many projects in which he and our Association made common cause, this book is a faithful chronicle. This angle of Pound's life, and perhaps the modern aspect of our Association, really start, of course, with his unforgettable address before the 29th Annual Meeting of our Association in St. Paul in 1906—the first address by a law teacher before our Association. He was then a Professor at the University of Nebraska—not yet thirty-six years old. He took as his topic: "The Causes of Popular Dissatisfaction with the Administration of Justice". He was skillful but candid in his analysis of the existent dissatisfaction and the reasons for it. He sounded the tocsin for very much of the advance which has since taken place in our Association and in the Courts of our country. But his indictment of the defects aroused great resentment among the "great and the near-great" of the Bar, present at the meeting. A vote to publish and distribute the address won slight support. If you wish to gauge how fast and how far our Association and our profession have travelled in

forty-two years, Professor Sayre's book will supply you with the measuring-stick.

His work has a wealth of detail and a charming sincerity and admiration for his subject. In format and typography, the book has defects which detract from ease in reading, but the fine material is there. The portrayal is one which should make every American proud to say: "Pound is a Nebraska lawyer and a Nebraska judge, who went on to become one of the noblest products of the profession of law—an American lawyer who has become a first citizen of the world, a gallant exemplar of our profession's devotion to peace, justice and law".

WILLIAM L. RANSOM
New York City

OUR UNKNOWN EX-PRESIDENT: A PORTRAIT OF HERBERT HOOVER. *By Eugene Lyons. New York: Doubleday and Company. June, 1948. $2.50. Pages 340.*

A brilliant Left Wing writer who says that as a publicity agent for the American Labor Party he devised and wrote much of the Left Wing's 1928-33 "smear" of President Hoover, has recanted his admiration for Communism and the work of its agents and has tried in this volume to undo the villification of a great American and give a fair portrayal of Mr. Hoover's career and patriotic services. He quotes, without express rejection, Professor Allan Nevins' summarization that, with all of Mr. Hoover's capacity for organizing departments and coping with emergencies, the latter could not "direct a party, lead a parliamentary group, or guide public opinion".

Those lawyers who heard and saw, in the convention hall or by television, the heart-warming ovation which our only living Ex-President received from the national convention of his party on the evening of June 22—a personal tribute which rose above partisanship in significance—will recognize in this volume an act of justice and fair play that has been too long delayed.

FEDERAL INCOME TAXATION OF TRUSTS AND ESTATES. *By Lloyd W. Kennedy. Boston: Little, Brown and Company. February, 1948. $16.50. Pages xiv, 837.*

The law of federal income taxation of the parties to a grantor-trust-beneficiary relationship is one of the most troublesome for the practitioner; and the concepts of "distributable income", the so-called *Clifford* doctrine, the Commissioner's controversial 1947 amendments of the regulations under it, and the new method of taxing the estate of a decedent, are capably treated in this volume, from the point of view of both the case law and the intricate regulations.

The author is a lawyer in active practice in Chicago, and has been a member of our Association since 1940, as well as of the Illinois, Pennsylvania and Chicago Bar Associations. He has contributed to the *Journal* of the American Judicature Society and to the magazine known as *Taxes*, but this is his first book. Likely trends in the extensive development of the law on the subject in the near future are indicated. A great deal of research and painstaking writing have brought the law together in a useful single volume.

ADEQUACY OF WORKMEN'S COMPENSATION. *By Arthur H. Reede. Cambridge, Massachusetts: Harvard University Press. 1948. $5.00. Pages xxiii, 422.*

The author of this informative study is Professor of Economics and Labor Adviser to the Bureau of Business Research at Pennsylvania State College. In a field where the ostensibly conflicting interests of employers and employees and of insurance concerns and politically minded administrative agencies produce considerable coloration of what is written, Professor Reede has produced an objective, competent and unbiased study of the workmen's compensation laws of the States and the federal government. His book will be useful to lawyers who are concerned in any capacity with these laws and their administration, and will be particularly helpful to those who are considering legislative trends and possible extensions of the coverage of workmen's compensation laws in place of tort liability for injuries from hazards of complex modern industry.

We Recommend . . .

THE MEMOIRS OF CORDELL HULL. New York: The Macmillan Company; 1948; $10.50 (two volumes, boxed); Pages 928, 844. (Reviewed on page 569 of this issue.)

CIVILIZATION ON TRIAL. By Arnold J. Toynbee. New York: Oxford University Press; 1948; $3.50; Pages 270. (Reviewed on page 569 of this issue.)

OUR UNKNOWN EX-PRESIDENT. By Eugene Lyons. Garden City, New York: Doubleday and Company; 1948; $2.75; Pages 340. (Noted on this page.)

THE GATHERING STORM. The War Memoirs of Winston Churchill (Volume One). New York: Houghton, Mifflin Company; 1948; $6.00; Pages 784.

THE LIFE OF ROSCOE POUND. By Paul Sayre. Iowa City, Iowa: College of Law Committee; 1948; $4.50; Pages 412. (Reviewed on page 575 of this issue.)

COMMUNISM AND THE CONSCIENCE OF THE WEST. By Fulton J. Sheen. Indianapolis: Bobbs-Merrill Company; 1948; $2.50; Pages 247. (Reviewed in 34 A.B.A.J. 494; June, 1948.)

ORDEAL OF THE UNION. By Allan Nevins. New York: Charles Scribner's Sons: 1947; $10.00 (2 vols.); Pages x, 593, 590. (Reviewed in 34 A.B.A.J. 229; March, 1948.)

CONFESSIONS OF AN UNCOMMON ATTORNEY. By Reginald L. Hine. New York: Macmillan Company; 1947; $4.00; Pages xix, 268. (Editorial in 34 A.B.A.J. 127; February, 1948; review at page 141, same issue.

THE DEVELOPMENT OF INTERNATIONAL LAW

Louis B. Sohn • Editor-in-Charge

■ The drafting and promulgation of international legislation to become in the United States upon ratification a part of "the supreme law of the land" under the Constitution, and the setting up of elaborate agencies, mechanisms and procedures for maintaining peace, justice and law in this hemisphere, continue at a prolific and accelerated pace. Through this department, the *Journal* has done all it could, within its limited space, to acquaint American lawyers, and through them the people, with the vastly significant developments in this field. Volumes would be required for full details with background information.

In this issue we enumerate and give the gist of the many documents which emanated from the Ninth International Conference of American States and were signed at Bogota. We publish in full the text of Chapters II and III of the Charter of the Organization of American States, because those chapters re-affirm "principles" on which the nations of the hemisphere agreed and declare "Fundamental Rights and Duties of States." Because twenty-one members of the United Nations joined at Bogota in this Chapter and other far-reaching conventions in the nature of international legislation, these documents seem certain to figure largely in the discussion of the same subjects in the General Assembly of the United Nations and its International Law Commission to be elected by the Assembly in Paris this fall.

The text of these two chapters, as well as that of other documents agreed on in Bogota, seems to be important and worthy of study and comment by American lawyers. Our Association started in 1946, through Regional Group Conferences in all parts of the United States (and in Canada in cooperation with the Canadian Bar Association), to obtain the considered opinion of lawyers as to the appropriate scope and contents of a Declaration of the Rights and Duties of States. Preliminary work had been done since 1944, beginning with *International Law of the Future*, which the *Journal* sent to its readers in June of 1944. Unfortunately, the 1946-47 Regional Group Conferences in aid of the drafting of such a Declaration had to be abandoned by our Association for lack of funds, and the work is at a standstill (34 A.B.A.J. 271; April, 1948). Members of our Association who wish to submit their considered views on Chapters II and III of the Bogota Charter, or on other related documents are invited to do so. A copy should be sent to the Legal Secretariat of the United Nations, Lake Success, Long Island, New York, and to the U. S. Delegation to the United Nations, No. 2 Park Avenue, New York City, with a copy to Louis B. Sohn at the Harvard Law School.

The Charter of Organization and the Economic Convention will become effective upon ratification of two-thirds of the signatories. The Treaty of Pacific Settlement and the two Conventions on the Rights of Women will come into force when ratified by two states. The Bogota Declaration on the Rights and Duties of Man and the other resolutions and recommendations of the Conference do not require ratification at all. Such reservations as were attached by the United States to its signature are stated by Mr. Sohn.

W. L. R.

The Treaties of Bogota and the Charter of the Organization of the American States

■ Despite the interruption caused by the riots at Bogota, the Ninth International Conference of American States succeeded in accomplishing its arduous task. On April 30 and May 2, the twenty-one American Republics signed the Charter of the Organization of American States (112 articles), the American Treaty of Pacific Settlement, to be known as the "Bogota Pact" (sixty articles), the "Economic Convention of Bogota" (forty-three articles), and two short conventions with respect to granting civil and political rights to women. The final act of the Conference contains in addition forty-six declarations, recommendations and resolutions, of which the most important are: The American Declaration of Rights and Duties of Man (thirty-eight articles), the Organic Statute of the Inter-American Commission of Women, the Inter-American Charter of Social Guarantees (not accepted by the United States), the Resolution on the preservation and defense of democracy in America, and the Resolution establishing the American Commission on Dependent Territories.

Three of the documents signed at Bogota are of particular interest to lawyers of America. The Treaty on Pacific Settlement streamlines the machinery for pacific settlement of disputes and replaces eight previous treaties on the subject. A clause modelled on Article 36 of the Statute of the World Court confers on the World Court broad obligatory jurisdiction over legal disputes. The treaty also codifies and enlarges previous obligations with respect to the investigation, conciliation and arbitration of disputes. The United States has signed this Treaty with several reservations, one of which incorporates by reference all reservations made by this country pursuant to the action of the Senate authorizing a

Declaration accepting jurisdiction under the Optional Clause in the Statute of the World Court. The Connally amendment, which the American Bar Association has opposed and sought to excise, is thus perpetuated. Similarly, Argentina and Peru reserved the right to decide for themselves which matters are within their domestic jurisdiction and are thus excluded from the jurisdiction of the World Court.

In place of an elaborate and detailed draft of a Declaration of Rights and Duties of Man prepared by the Inter-American Juridical Committee, the Conference adopted a terse and pithy statement of twenty-seven rights and ten duties. This Declaration, thus accepted officially by twenty-one members of the United Nations, may exercise considerable influence on the final drafting of a similar Declaration which may be considered by the General Assembly of the United Nations in September.

The main results of the Bogota Conference are embodied in the Charter of the Organization of American States. Until now, the structure of the so-called Union of American States has been based on a series of resolutions, without the benefit of a formal convention. When a convention on the subject was prepared at Havana in 1928, ratification by all signatory states was required; although sixteen states ratified it, that convention never came into force. This lesson was not overlooked at Bogota, and the new Charter will enter into force upon its ratification by two-thirds of the signatory states; but it will become legally binding upon the United States only upon ratification by it.

The new Organization considers itself, and is set up, as a regional agency "within the United Nations", and none of the provisions of its Charter are to be construed as impairing the rights and obligations of the member states under the Charter of the United Nations. The supreme organ of the Organization is the Inter-American Conference, which shall convene every five years. In urgent cases, any member state may request the convocation of a Meeting of Consultation of Ministers of Foreign Affairs. In particular, such a meeting shall be held without delay in case of an armed attack within the American security region as defined in previous treaties. In dealing with matters relating to defense against aggression, the Meetings of Consultation will be assisted by the Advisory Defense Committee.

In keeping with inter-American tradition but in contrast to generally accepted constitutional rules, the Council of the Organization and its principal organs are composed of representatives of all member states. The main organs of the Council are: The Inter-American Economic and Social Council, the Inter-American Council of Jurists (with a permanent committee of nine members—the Inter-American Juridical Committee of Rio de Janeiro), and the Inter-American Cultural Council. The General Secretariat of the Organization retains the traditional name of the Pan American Union; but its Director General, Alberto Lleras Camargo, of Colombia, will become Secretary-General of the new Organization for a ten-year term.

While Part II of the Charter establishes the structure of the new Organization, Part I deals with the aims of the Organization, re-affirms the main principles on which inter-American relations are based, and defines the fundamental rights and duties of states. In addition, it specifies the methods for the pacific settlement of disputes and the action to be taken in case of aggression. The member states also agree to cooperate in the solution of economic problems, and in the improvement of social and cultural standards.

Articles 6 to 19 of the Charter, which deal with the fundamental rights and duties of states, represent the apex of two centuries of effort. In his *Jus Gentium*, published in 1749, Christian Wolff presented the first detailed statement of rights and duties of nations. In 1793, a declaration on the subject, proposed by Abbé Grégoire, was debated by the French National Convention. Throughout the nineteenth century, individuals of many nations, including the American codifier, David Dudley Field, produced dozens of drafts. In 1891, a short statement was approved by the Universal Peace Congress at Rome, and another avalanche of drafts followed. The crest of this wave was marked by the Declaration adopted by the American Institute of International Law in 1916. In a speech in 1923, Secretary of State Hughes stated that this declaration "embodies the fundamental principles of policy of the United States in relation to the Republics of Latin America".

At the Peace Conference at Paris in 1919, the Italian delegation presented a draft of a declaration but no action was taken on the subject. In addition to numerous drafts by individuals (in particular, those of Alejandro Alvarez, of Chile), drafts of declarations were approved by several prominent international organizations—the International Juridical Union, the Inter-Parliamentary Union, the International Diplomatic Academy, and the International Law Association. The first official success came when the Seventh International Conference of American States, meeting at Montevideo in 1933, adopted a convention on rights and duties of states which was ratified by sixteen states, including the United States.

Building on the foundation of this long endeavor, 200 Americans and Canadians agreed in 1943 on ten duties of states which should form the basic "principles" of the *International Law of the Future*, published in March, 1944, by the American Bar Association (see 30 A.B.A.J. 560; October, 1944) and acclaimed throughout the world. Several of these principles found their way into the Charter of the United Nations, and the same term—"principles"—was used to describe them (Article 2). To supplement this statement in the Charter, Dr. Alfaro of Panama proposed to the United Nations, first at San Francisco in 1945 and again at Flushing Meadows in 1946, the preparation of a new Declara-

tion of Rights and Duties of States which would draw upon the fifty-odd draft declarations now extant. His own draft of twenty-four rights and duties will constitute the basis of discussion in the International Law Commission to be elected by the General Assembly in Paris this fall.

In the meantime, the American Republics entrusted a similar project to the Governing Board of the Pan American Union, which prepared a draft in July of 1946. This draft was revised and shortened at Bogota, and as embodied in Chapter III of the Bogota Charter it will influence all further discussions of this topic.

In anticipation of this development, early in 1946 a series of Regional Group Conferences convened by the American Bar Association under the auspices of the Committee for Peace and Law Through United Nations, was devoted to the study of the principal declarations of rights and duties of states. Recent developments have re-emphasized the importance and the urgency of such a study, on which American lawyers made so hopeful a start. The basic issue still remains: Can a declaration of inter-American "principles" be made world-wide, or does the world outside the Americas require a different set of "principles"? If the latter approach is considered, which "principles" may remain intact, which duties shall be made more strict, which obligations will have to be omitted or weakened? Only careful investigation can supply an answer to these questions.

Text of Chapters II and III of the Charter of the Organization of American States

CHAPTER II. PRINCIPLES

Article 5.—The American States reaffirm the following principles:

a) International law is the standard of conduct of states in their reciprocal relations.
b) International order consists essentially of respect for the personality, sovereignty, and independence of states, and the faithful fulfillment of obligations derived from treaties and other sources of international law.
c) Good faith should govern the relations between states.
d) The solidarity of the American States and the high aims which are sought through it require the political organization of those states on the basis of effective exercise of representative democracy.
e) The American States condemn war of aggression; victory does not give rights.
f) An act of aggression against one American State is an act of aggression against all the other American states.
g) Controversies of an international character arising between two or more American States shall be settled by peaceful procedures.
h) Social justice and social security are the bases of lasting peace.
i) Economic cooperation is essential to the common welfare and prosperity of peoples of the continent.
j) The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex.
k) The spiritual unity of the continent is based on respect for the cultural values of the American countries and demands their close cooperation for the high purposes of civilization.
l) The education of peoples should be directed toward justice, freedom, and peace.

CHAPTER III. FUNDAMENTAL RIGHTS AND DUTIES OF STATES

Article 6.—States are juridically equal, enjoy equal rights and equal capacity to exercise these rights, and have equal duties. The rights of each state depend not upon its power to ensure the exercise thereof, but upon the mere fact of its existence as a person under international law.

Article 7.—Every American State has the duty to respect the rights enjoyed by other states in accordance with international law.

Article 8.—The fundamental rights of states may not be impaired in any manner whatsoever.

Article 9.—The political existence of a state is independent of its recognition by other states. Even before being recognized, the state has the right to defend its integrity and independence, to provide for its preservation and prosperity, and, consequently, to organize itself as it sees fit, to legislate concerning its interests, to administer its services, and to determine the jurisdiction and competence of its courts. The exercise of these rights is limited only by the exercise of the rights of other states in accordance with international law.

Article 10.—Recognition implies that the state granting it accepts the personality of the new state with all the rights and duties that international law prescribes for the two states.

Article 11.—The right of each state to protect itself and to live its own life does not authorize it to commit unjust acts against another state.

Article 12.—The jurisdiction of states within the limits of their national territory is exercised equally over all the inhabitants, whether nationals or aliens.

Article 13.—Each state has the right to develop its cultural, political, and economic life freely and naturally. In this free development, the state shall respect the rights of the individual and the principles of universal morality.

Article 14.—Respect for and the faithful observance of treaties constitute standards for the development of peaceful relations among states. International treaties and agreements should be public.

Article 15.—No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the state or against its political, economic, and cultural elements.

Article 16.—No state may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another state and obtain from it advantages of any kind.

Article 17.—The territory of a state is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another state, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.

Article 18.—The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties, or in fulfillment thereof.

Article 19.—Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles set forth in Articles 15 and 17.

THE PRESIDENT'S PAGE

TAPPAN GREGORY

■ News of the sudden serious illness of Judge Ransom has been the cause of great anxiety. He has not spared himself in his untiring efforts to sustain the quality of the JOURNAL at the high level to which he has brought it by his brilliant and indefatigable application, involving as it did driving himself too hard in undertaking the burden of what would normally be considered the work of several men. I look forward hopefully, but with great impatience, to the time, very soon, when he will be his old self again and will permit us to ease some of the burdens that we have heedlessly allowed him to carry.

Delicate Task of Estimating Association Income

At the beginning of each fiscal year we undertake with some trepidation to estimate the amount of income that we may reasonably expect to realize from dues during that year. This is surrounded with great uncertainty always because so many things, seemingly of minor importance, may have a great bearing on the stability of our membership. We cannot be over-conservative, for if we pursue that policy, worthy projects will be allowed to languish. We must not be too optimistic or we shall find ourselves invading surplus. It is only within the last few days, and that means within about fifteen days of the close of the fiscal year that our receipts have reached the figure at which the estimated income was fixed. I should like to pay tribute to those charged with the duty of making this estimate for the accuracy with which our income was forecast. Appropriations were made in the budget on the basis of the amount estimated and we may now take satisfaction in the realization that in the calculation of the amount on which we might reasonably expect to rely, we have come very close to the mark.

Our experience during the last year in watching and reviewing the work of committees is very persuasive of the desirability of appropriating enough for each active committee so that at least one meeting of the members may be held during the year.

There are examples demonstrating the dangers of misunderstanding and disagreement in spite of the most conscientious effort on the part of the Chairman to explore the views of all of the members of his committee before formulating a report. Sometimes dissents do not appear until a report is submitted. Again it may transpire that the purposes of the committee are held within limits that are too narrow or not clearly understood; or it may be that delays attendant upon adequate inter-communication by mail impair the value of the committee's work.

Nominations Submitted to Director of Civil Defense Planning

At the request of the Director of Civil Defense Planning of the Office of the Secretary of Defense, nominations have been sent to him for appointment by him of persons to serve in an advisory capacity in connection with his work as it touches the legal and legislative division of his Civil Defense organization. The Director, Russell J. Hopley, has expressed himself as pleased with the list furnished him. It was a great help in making up this list to have Mr. Holman available for advice and collaboration.

Board of Governors Sets Annual Meetings

The Board of Governors has decided to hold the 1949 annual meeting at St. Louis, Missouri, between September 3 and 9, and the 1950 annual meeting in Washington, D. C., during the week commencing September 17.

Section of Labor Relations Law Plans Regional Meeting

The Section of Labor Relations Law is planning a regional meeting to be held in Chicago with the collaboration of the Chicago Bar Association. Meeting of this sort, it seems to me, should be encouraged, especially until such time as the Association may resume its regional meetings.

The Committee on Participation by Lawyers as Citizens in Public Affairs has asked leave of the Administration Committee of the Board of Governors to accept contributions from sources other than our own membership to finance the holding of a conference in Seattle immediately after the close of the annual meeting, comparable to the very stimulating and successful conference organized and presided over by Chief Justice-Designate Vanderbilt in connection with the establishment of the Citizenship Clearing House of New York University School of Law.

The work of the Administration Committee has been of tremendous value in organizing and laying before the Board of Governors matters requiring the Board's action.

Lawyers *in the News*

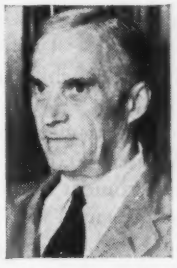
John J. PARKER

■ Senior Circuit Judge John J. PARKER of the Fourth Circuit and North Carolina, alternate United States member of the International Military Tribunal for the Nuremberg trial, was in Britain and on the continent late in May and early in June, to renew acquaintance with the great jurists and lawyers with whom he had been associated in the historic trial in which he had an honored and influential part. He was the official guest at Holyrood Palace when he visited the Scottish Courts at Edinburgh; he sat with the beloved Sir Norman Birkett in the King's Bench, in the Court of Criminal Appeal, and in the Probate, Divorce and Admiralty Division, and went to Lancaster Assizes. As an Honorary Bencher of the Inner Temple, he attended Grand Night on June 2.

From the London *Spectator* for May 28 we take an interesting account of a notable dinner given by Sir Norman in Judge PARKER's honor; it was written by the editor of the *Spectator*, who made a most modest reference to himself as one of the two laymen present:

> Very rarely is so distinguished a company assembled as gathered, at the hospitable invitation of Mr. Justice Birkett, at dinner at the Reform Club on Tuesday to do honour to Judge Parker, one of the two American Judges at the Nuremberg trial, who is visiting this country at present to study the British legal system at work. Everyone who is anything in the legal world was there—the Lord Chancellor, who proposed the health of the chief guest, an ex-Lord Chancellor in Lord Simon, the Master of the Rolls, the Lord Chief Justice, the Attorney-General, Law Lords like Lord Wright and Lord Macmillan, Lord Schuster, half a dozen or so High Court Judges, advocates like Sir Walter Monckton and Mr. G. O. Slade— and so on. Of the only two laymen in the company one is (among other things) a Director of the Bank of England, the other a person of no importance, invited out of charity. It would be hard to pick a more gifted trio of after-dinner speakers than the Lord Chancellor, Lord Simon and Sir Norman Birkett himself, and each of them on Tuesday was at his best. But in content the speech of the evening was that of Judge Parker, who after an appropriately light opening went on to justify convincingly the Nuremberg proceedings and to emphasize impressively the vital need for Britain and America to stand together inseparably in defence of the heritage common to both of them—the legacy of Magna Carta and the Bill of Rights, of Shakespeare and Milton, of Chatham and Burke, of Sir Edward Coke and Hampden and Sir William Blackstone. One could wish that the speech might be repeated in substance at a public rather than a private gathering.

American lawyers and judges will rejoice that honors so appropriate were thus bestowed in Britain upon one of our own illustrious jurists, member and valiant worker in our Association since 1917, recipient in 1943 of our Association's Gold Medal for conspicuous services to jurisprudence, who, like other great Americans still in our Circuit Courts of Appeals and our highest State Courts of law, has long been richly deserving of being elevated to the highest Court of our country (see 32 A.B.A.J. 857; December, 1932), but has been withheld from it by a practice of limiting appointments by partisan considerations and supposed subservience to a particular juridical philosophy and ideology.

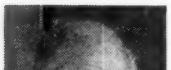


Harold EVANS

Acme

■ A 61-year old lawyer in active practice in Philadelphia, member of our Association since 1926, was on May 13 agreed on by the Arabs and Jews and designated at Lake Success as the Municipal Commissioner to have charge of Jerusalem during the troubled days ahead. Probably no job less wanted or more likely to be "thankless" (as he called it) was ever proffered an American Lawyer. But EVANS accepted it, and announced that he would leave for Palestine as soon as he could. He sailed for Europe on May 25.

EVANS was agreed on by the warring races because he is a Quaker and a worker for peace and against militarism. He is a member of the executive board of the American Friends Service Committee, and is the presiding clerk of the Philadelphia yearly meeting. In 1925-26 he was a member of the Public Service Commission of Pennsylvania. In the winter of 1941 he went abroad for the Quakers to investigate conditions of child nutrition in Germany and in countries which the Nazis had occupied. His personality and his Quaker faith have gained the respect and confidence of men who do not agree with the tenets of his belief.



Richard W. FLOURNOY

■ After serving forty-four years and eleven months in the United States Department of State, which he entered as a clerk in 1903 and of which he has for some years been the Assistant Legal Adviser, FLOURNOY retired from the government service on May 28 and was presented with a commendation from Secretary George C. Marshall for his "contribution to the development of the law in the fields of nationality, immigration and naturalization" and for his "exemplary" representation of this country in these matters, at home and abroad. This ceremony was followed by a reception given in his honor by his associates, in the offices of Ernest Gross, Legal Adviser of the Department.

FLOURNOY has been a member of our Association since 1938, and has taken part in the work of the Committee on Nationality and Naturalization in the Section of International and Comparative Law. Born in Hampden-Sydney, Virginia, in 1878, FLOURNOY has lived in and near the District of Columbia most of his life, and has long been a resident of the State of Maryland. After completing high school at Western, in Washington, he attended Washington and Lee University for three years before taking his LL.B. in 1904 and his LL.M. in 1905 at George Washington University. He is a member of the Bar of the District of Columbia.

During his career in the Government, FLOURNOY has risen to recognition as a foremost authority on nationality, immigration and naturalization. As the Chairman of the Inter-Departmental Committee to study nationality laws of the United States with a view to having them amended, he was responsible for drafting a large part of the Nationality Act of 1940. He has been a prolific writer on nationality. In 1929 he was co-author, with Judge Manley O. Hudson, of *Collection of Nationality Laws of All Countries.*

Among his many affiliations and designations on committees on international law were the Harvard Research on Nationality, 1928, on which he served as Reporter. He has been a member of the Executive Committee of the Harvard Research on International Law since 1930, and is an active member of the American Society of International Law.

In 1915, as Chief of the Bureau of Citizenship, now the Passport Division, FLOURNOY was sent to Europe by the Department to assist the embassies and legations regarding citizenship matters. In 1919 he became Assistant Solicitor of the Department. He was assigned as legal adviser to the American Delegation on the Plebiscitary Commission for the Tacna-Arica Arbitration in 1926. In 1930 he represented the United States as a delegate to the International Conference on the Codification of International Law at The Hague. Also in 1930, he acted as United State Counsel in the Shufeldt Arbitration with the Government of Guatemala. In 1936 he was legal adviser to the Delegation at the London Naval Conference, where he earned commendation for his assistance in preparing the resulting treaty.

David A. MORSE

■ A 41-year-old New Jersey lawyer, member of our Association since 1937 and an "alumnus" of its Junior Bar Conference, was elected on June 12 as Director-General of the International Labor Organization, and his immediate acceptance eliminated himself from consideration as the most likely choice for the Cabinet post of Secretary of Labor to succeed Judge Lewis B. Schwellenbach, who had died a few days before. The selection of Mr. MORSE, who is Under Secretary of Labor and Chairman of the United States Delegation to the ILO, was made by the governing body of the ILO, in session in San Francisco. He received thirty out of a possible thirty-two votes for the position, and expects to enter upon his duties at the Geneva, Switzerland, office of the ILO, early in September.

Mr. MORSE's new post carries a $20,000 salary and a tenure probably extending until he comes to the age of sixty, when retirement is compulsory, whereas as Secretary of Labor his salary would have been $12,000 and his tenure dependent upon the outcome of the 1948 presidential election.

MORSE was born in New York City, and attended Rutgers University in New Jersey, where he starred in football and became a resident of the State. After being graduated from the Harvard Law School, his advocacy of New Deal measures led to his appointment to several posts in the federal government and to that of Regional Attorney for the NLRB for the Second Region (New York and New Jersey). He resigned to become a partner in a Newark law firm and to act as attorney for various labor organizations. He became an officer in the Army Air Forces and as a lieutenant-colonel was director of labor policies for the Military Government group in Sicily, Italy, Germany and Japan. After serving as General Counsel for the NLRB, on July 1, 1946, he became an Assistant Secretary of Labor, and later was made Under Secretary of Labor.

In our Association in 1939-40 he was a member of its Committee on Labor, Employment and Social Se-

curity. His wife is a granddaughter of the late Oscar S. Straus (34 A.B.A.J. 99; February, 1948). Another granddaughter is married to Paul M. Herzog, of New York, Chairman of the NLRB, who has been a member of our Association since 1947 and attended and addressed our Cleveland meeting in 1947.

The ILO was first established under the League of Nations and reorganized under the United Nations. It is a tripartite agency made up of representatives supposedly from employers as well as from government and labor organizations. Upon his election, Mr. MORSE declared that the ILO is "the greatest living governmental vehicle for world peace", and pledged himself to "take advantage of the great opportunity that has come my way to work to that end". He said that "through the intelligent continuation of the policies of the ILO, working with employers, workers and governments of the entire world, we have a forum here of an international kind which cannot be beaten for coming to grips with problems, economic and social, which often precipitate international difficulties and often make for war".

W. St. John GARWOOD

■ A Houston lawyer of diversified experience and wide acquaintance in his profession, a member of our Association since 1925, has become an Associate Justice of the Supreme Court of Texas. He is the first member of that Court to come from the able Bar of Houston in seventy-four years.

Judge GARWOOD was born in Bastrop, Texas, in 1896. His father, Judge Hiram Morgan Garwood, was an original member of the Houston law firm then known as Baker, Botts, Parker & Garwood. After attending Sacred Heart School, St. Thomas College and Barnett School in Houston, the present Judge GARWOOD attended Georgetown Preparatory School in Washington, D. C., in 1911-13. For the next four years he studied at Georgetown College and received a bachelor of arts degree in 1917.

He entered the First Texas Cavalry Brigade of the Texas National Guard at the outbreak of World War I and was commissioned a first lieutenant. He served with the brigade at Camp Stanley and was in training there when the war ended. From January to June of 1919 he attended the University of Texas Law School and was admitted to the Texas Bar in that year. He then went to Harvard Law School, where he received his LL.B. degree in 1922.

Before his graduation from Harvard, he was offered and accepted a position with the Texas Company in New York. He remained there until 1924, when he returned to Houston to practice with his father's firm until 1928. In that year he went to Buenos Aires with the Standard Oil of New Jersey and remained there until 1934, when he returned to Houston as a member of the firm of Andrews, Kelley, Kurth & Campbell. Judge GARWOOD withdrew from that firm in 1941 to practice independently.

Entering the Navy in February of 1942 after the Pearl Harbor attack, Lieutenant-Commander GARWOOD remained on duty until 1945 with the Intelligence Department in South America. He holds the decoration of Official Order of Merit, Republic of Chile. Since his discharge from the Navy, Judge GARWOOD engaged in private practice in Houston, and also found time to serve as vice chairman of the Houston Civil Service Commission in 1945-47, president of the Houston Committee on Foreign Relations in 1947-48, and member of the advisory committee and honorary faculty member of the University of Houston Law School.

He is a member of the Houston Bar Association, the State Bar of Texas, the American Judicature Society, the American Law Institute, and the Harvard Law School Association, as well as our Association. In 1940 he attended the Havana meeting of the Inter-American Association as the Houston Bar delegate. A former vice president and director of the Houston Bar Association, he was admitted to the New York Bar in 1923 and once served briefly as Honorary Consul of the Republic of Poland for Texas. He also holds membership in the American Legion and the Military Order of the World Wars, is a former vice president of the Houston Chamber of Commerce and a former president of the Houston Foreign Trade Association.

In 1927 he was married to Miss Ellen B. Clayton, daughter of Will Clayton, of Texas, former Under Secretary of State.

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■ *Discussing Decisions of the Supreme Court*

From time to time the Board of Editors of the JOURNAL, upon what they believe to be their own responsibility to the profession and the public, have analyzed carefully and at more than usual length particular decisions of the Supreme Court of the United States and then have pointed out what appeared to be implications and consequences of the majority rulings, with an invitation to our readers to form and express their own impressions about them. As instances we refer to the discussions of the *Girouard* decision (328 U.S. 61) as to the military obligation of alien applicants for citizenship (33 A.B.A.J. 95; February, 1947), the *Winters* decision as to the vending of magazines containing only "massed" portrayals of crime (34 A.B.A.J. 410; May, 1948), and the *McCollum* decision as to opportunity for religious instruction for pupils in public schools (34 A.B.A.J. 818; April, 1948). There will be others as occasion arises.

In this issue we publish an article by Ben W. Palmer on dissents and reversals in the Supreme Court. In subsequent contributions he will discuss their causes as well as their significance. Much of the present article is statistical; it seemed appropriate to Mr. Palmer to assemble material scattered through many records, in order to determine the extent and effects of the manifestations discussed. As he puts it, "There is here in compact form the story told by the record". The assembly of material and the conclusions stated are Mr. Palmer's own; we publish them because we believe them to be a reasoned presentation which lawyers and judges should read and consider.

As the discussions proceed to a consideration of causes and effects, we express the hope that the purposes of such analyses and expositions may be rightly understood. When discussing the Supreme Court and the divisions of opinion in it, many men tend to be emotional, partisan, personal. We hope that the discussions in the JOURNAL have been, and will continue to be, detached, fair, impersonal and well-grounded. We do not ask or expect that our readers will agree with all we write or publish; in fact, we hope most of all that what we publish will prompt considered expressions of views by others which will stimulate a healthy interest and a sound public opinion. The consensus of leaders of the profession, arrived at through fair exchange of considered views, should be salutary for the JOURNAL, the profession, and the public, and for the great Court itself.

Our course is largely determined by the fact that unless the JOURNAL deals with these matters straightforwardly and frankly, there is no agency for crystallizing and expressing the mature judgment of the practicing lawyers of America on these issues of great moment as to our Court of last resort. Many of the law reviews comment continually, and express assiduous approval, as to majority rulings which cause grave concern to some members of the Court, to many judges in other Courts, and to many members of the Bar. The analysis and discussion of these matters could not wisely, we think, be left wholly to law students and law professors in some law schools. Unless the JOURNAL provides it, there is no medium or forum for independent, untrammelled expression of the earnest, experienced views of the practicing lawyers of the country.

The Supreme Court as an institution is properly an object of reverence to those who understand its historic significance, its constitutional purpose, and its example to the world today. We yield to none in our veneration for the Court and our fealty to its great function in our body politic. The provisions of our Constitution as to judicial power represent the highest achievement of man's political and social evolution. Critical students of the Constitution and the Court generally accept the assertion of the historian Fiske that

> The federal judiciary was the most remarkable and original of all the creations of that wonderful convention. It was charged with the duty of interpreting, in accordance with the general principles of Common Law, the Federal Constitution itself. This is the most noble as it is the most distinctive feature in the government of the United States.

We think that our Association and its JOURNAL have

shown by deeds as well as words their devotion to the Court and their willingness to give battle to any who try to undermine or impair it. Furthermore, the men who at any time serve as judges of the Court should be accorded due respect. Our ties to many of them are from years of friendship. They receive our high regard because of their personal attainments and because of their exalted post of duty. But our respect for the institution and for the men who are members of it cannot lessen or silence our concern for the Court or our zeal for the maintenance of its traditional place and function in our federal republic. Still less could we permit personal considerations to outweigh our fidelity to our governmental system of separated and limited powers, with the legislative function vested only in the Congress and the Court commanded to protect the rights of the States and the people against arbitrary encroachments of the executive branch. To disagree with the Congress, the President, or the Court, when we sincerely believe any of them to be wrong on a vital issue, is a duty of an independent profession under the American system—an attribute of freedom itself, not a reflection on individuals. If we are to maintain at home and demonstrate to the world a government not of men but of law, no deference for men can be permitted ever to weaken our outspoken devotion to law and the fundamentals of our American system.

■ *Issues Crystallize as to the Veto*

On July 15 the Little Assembly (Interim Committee) of the United Nations is due to make its report on questions of voting in the Security Council. The meeting of the General Assembly in Paris in September will thus have before it, for the first time, carefully studied analyses and proposals as to what should be considered at this time—what areas of decision should be excluded from the requirement of unanimity of voting by the United States, the United Kingdom, France, China, and the Soviet Union.

The General Assembly will also have before it the 9-to-6 advisory opinion of the World Court on the Assembly's request for advice as to whether a nation represented in the Security Council is legally entitled to attach to the admission of new members to the United Nations any conditions or criteria beyond those expressly stated in the Charter. The majority in the Court said "no"; also that in voting to admit a state could not subject its affirmative vote to the additional condition that other states be admitted to membership in the United Nations together with that state. Dissenting were the judges from Canada, France, Poland, the United Kingdom, Yugoslavia and the Soviet Union.

More vetoes have been interposed on the admission of new states than on any other type of question. The Soviet Union has cast ten of its twenty-five vetoes to prevent admissions. Many negative votes on admissions have been cast by the United States and other countries, but they do not count as vetoes because they were not in instances where a minority thwarted the majority action.

Despite a great deal of fervid debate, in the General Assembly and outside it, no one is seriously trying to abolish the veto or amend the Charter at this time so as to limit it. Secretary Marshall proposed that the

nations agree to restrict the use of it so that it would not apply to the admission of new members or steps for the peaceful settlement of disputes. There is no reason to believe that the United States, the United Kingdom, or Russia, would amend the Charter at this time if they could, to revise the voting formula in the Security Council. The Interim Committee has sought rules to guide members of the Council—agreement on a moderate use of the veto—a use limited to major matters. At the present writing, the majority proposal in the Committee is that out of ninety-eight types of possible decisions which the Security Council may be called on to make, thirty-six shall be deemed to be "procedural" and so not to require unanimous action by the five principal powers and that twenty-one others relating to steps for the pacific settlement of disputes shall be subject to decision by any seven members of the Council. That would leave forty-one types of actions still in the area of the veto. Certainly so long as the smallest state has the same voting strength as the largest, the nations which have large military, naval, financial and economic resources are not likely to let a numerical majority of states commit them, without their consent, to use their forces in acts tantamount to war.

■ *Department of Legislation*

This issue of the JOURNAL, like almost every other, contains abundant evidence of the reasons which have led the Board of Editors to plan and establish a department which will be devoted to the improvement of the technique of legislation. The introductory article in the department itself is a part of the background. Mr. Justice Jackson's address before the Law Institute was an animated exposition of the need for the utmost care and skill in the drafting of legislation to the end that its text shall contain and state its meaning so unmistakably as to foreclose any claim that something intended was left unsaid or unclear.

His striking quotation from Lord Macmillan confirmed that in Britain as well as here the multiplicity of statutes and regulations having the force of law have largely superseded or obscured the common law at manifold points. "The capital fact in the mechanism of modern states is the energy of legislatures." But the "legislative" activity of our highest Courts may be a product, in part, of hurried and improvised legislative draftmanship that lacks research, art, precision, completeness of expression of what is meant. "Judicial legislation" may tend to be more expert, for a variety of reasons, but its ascendancy would destroy the basic American constitutional concept of the separation of governmental powers. The bulwark against it must be better legislative organization and procedures, better staffing and research, and greater expertness in the drafting of laws, in our legislative bodies. As President of our Association in 1939, Frank J. Hogan's memorable address (25 A.B.A.J. 629; August, 1939) warned that the people of the United States must thereafter look to the Congress in the drafting of statutes, not to the Supreme Court in litigation about them, for the observance and enforcement of constitutional limitations and for the protection of the rights of persons and States against encroachments by the federal government. His warning was protested and inveighed against at the time, but his admonition to the Congress has an ever-increasing force as truth.

Our law schools and our organizations of the Bar may have placed too much emphasis on decisional law and too little on the art of legislation, in legal education and in the preparing of young men for their work in our profession. As was pointed out in a book review in our June issue (page 495), a large percentage of the members of all legislatures are lawyers, many of them young lawyers; yet few of them have received education or training for the tasks devolving on them.

Our readers are fortunate that in starting and conducting this department we have the assistance of the staff and experience of the Legislative Drafting Research Fund of Columbia University, which pioneered in the field and has done outstanding work for better legislative organization, research, drafting and presentation. Professor Harry Wilmer Jones of that organization is Editor-in-Charge for us. The contents of the department will be shaped according to what is found most likely to be useful. Early issues will of necessity be in a sense experimental.

■ *Constitutionalism on the March in the World*

The rise of constitutionalism in the free nations and the development among them of charters and structures for association, cooperation, federation, for specific common purposes but with defined and limited powers, have been capital and concomitant facts of the post-war world. The first of these has been well traced in "Post-War Constitutional Trends" in *Freedom and Union* for May and in the *Quarterly Research Survey* (No. 4) of the Pacific Research Bureau for December, 1947. Twelve nation-states have adopted new constitutions, and most of them have empowered independent Courts to invalidate unconstitutional action by officers and agencies of government. We commented on the significance of the new Constitution of the Republic of Italy at the time it was promulgated (34 A.B.A.J. 130; February, 1948); the establishment of that organic law seemed to us the first great step in resistance to totalitarian inroads, the forerunner of electoral victory over a Communism which did not dare to challenge at the time the charter which the people had adopted for their republic.

France, Italy, China, Brazil, and others, in their new organic law definitely limit, in favor of international organization and action for peace and law, what had long been regarded as national "sovereignty". Many

issues of the JOURNAL since the ending of the war have placed before our readers the text or gist of international documents, consummated or proposed, by which nations outside the Soviet orbit have associated and bound themselves to act together for common ends not limited to defense and survival and have erected mechanisms of specific, limited powers of a nature and to an extent that did not flourish before World War II. The latest, and among the most significant, of these is the Charter of Organization of American States and other documents completed and signed under dramatic circumstances at the Bogota Conference on April 30 and May 2, as summarized on pages 577-579 of this issue. In particular, the Declaration of the Rights and Duties of States, of which we publish the full text, shows what free nations can agree on and do, without compromise or concession to totalitarian ideologies, along the lines suggested in "A Covenant of Free Nations: Shall They Agree on Basic Rights and Freedoms?" (34 A.B.A.J. 349; May, 1948). The agreements and developments among the free nations of Europe, which our space has permitted us to report only in part (34 A.B.A.J. 53, January, 1948; 34 A.B.A.J. 200, March, 1948; 34 A.B.A.J. 312, April, 1948; 34 A.B.A.J. 349, 406, May, 1948; 34 A.B.A.J. 475, June, 1948), have been even more consequential, because they have been concluded in the presence of imminent dangers to the independence of Western European governments and peoples and so to peace and security in all the Americas.

We refer here to these new constitutions of free nations and these agreements for closer international association and organization because they reflect, in the first place, what lawyers in their respective countries are doing, as always, to buttress and bulwark the essential institutions of freedom, justice and law. Beyond that, they are early manifestations, undoubtedly, of trends towards concepts of some constitutionalism in a world no longer willing to leave preventive and defensive action to the impromptu, improvised and unrestricted action of those who chance to be the heads of states when stark emergency arises. Bitter experience and current revelations have indicated that the interests and basic freedoms of the nations will be better preserved if the structures and procedures for collective action for security have been definitively formulated and agreed on in advance, within the framework of the United Nations, and if the provisions for it have been made sufficiently specific and limited to assure democratic rather than autocratic action.

These manifestations should be harbingers of a world more nearly law-governed—*a juridical order*—which would mean a world in which peace and human opportunities and rights are more secure. "We are coming up the steeps of time, and this old world is growing brighter." The first peace society in this country was organized in 1815. By 1850 there were at least fifty such societies. But their influence was dissipated by disagreements as to ways and means. Some were made up of out-and-out pacifists who thought peace could be maintained by refusing to fight, even in defense of our country. Some put their faith in education and hoped to convince all men that war was evil. Others centered their faith in religion and worked for a union of churches or clerics. Still others of materialist and positivist ideology were convinced that wars were caused by economic conditions; they sought to remove or lessen the causes through freedom of trade and commerce and through advocacy of re-distributions of the means of production. Reduction and limitation of armaments were proposed and tried. So were economic sanctions, boycotts against belligerents. Arbitration was emphasized; treaties were made, and a Permanent Court of Arbitration was established at The Hague. Proposals were broached for permanent commissions of inquiry, cooling-off periods, and compulsory arbitration. In 1914, a hundred years after the first peace society, the League To Enforce Peace was organized, with ex-President William Howard Taft as its head and leaders in law, religion, education, politics, business, labor, and the organized farmers, among its charter members. Later the Kellogg-Briand Pact attempted to "outlaw war" by agreement. The Society for Judicial Settlement of International Disputes was formed, and a World Court was finally brought into being at The Hague.

Out of World War I came the League of Nations, which proved inadequate, perhaps because the United States held aloof. In the last stages of World War II came the United Nations and its Charter, to maintain a peace which did not exist and to provide the machinery for collective action against an aggressor. The United States and Russia agreed and insisted on a "veto" so broad that it could be and was invoked against many steps by the Security Council for the peaceful settlement of existent and incipient disputes. Even a program to curb the menace of the atomic bomb was frustrated. New disorders and conflicts arose unchecked in many parts of a smouldering world; and many agencies of the United Nations devoted themselves to drastic, starry-eyed, provocative projects for re-making the world along lines that had been rejected by the people of the United States. The battles for constitutionalism had to be fought and won by the peoples of the freedom-loving countries, with American aid and support, while agencies of the United Nations devoted vast time and money to drafting and promulgating socializing experimentation which could become effective only if ratified by the member nations through their respective constitutional processes.

Meanwhile, lawyers and their statesmanship and draftmanship have again come to the fore. Today we are engaged, not in the organization of peace societies, not in the study of temporizing measures of expediency, but are definitely entering upon the progressive development and codification of world law and the more active consideration of proposals for the strengthening of the United Nations Charter and procedures so as to

give the world what lawyers, ecclesiastics, statesmen, and scholars have recognized for hundreds of years as the great goal of enlightened mankind—*a juridical order* based on individual opportunity and God-given basic rights, under charters containing specific but limited powers of authorized action. A world order based on law, achieved if possible through the United Nations, has been an objective of our Association since 1944 and is now supported by the leaders of both political parties.

Amid all this there has been insistent agitation for world government in some form. The House of Delegates in 1944 declared its opposition to "any manner of super-government or super-state" (30 A.B.A.J. 545; October, 1944). That declaration has not been expressly withdrawn or modified; some subsequent actions have favored measures which could be construed as amounting to a limited world government for specific purposes, notably as to the atomic bomb. The House of Delegates has reiterated its emphasis on "united, *undivided* support of the United Nations", along with substantial strengthening of its Charter. As to the scope of adjudication by the World Court, our Association has favored an unqualified acceptance of jurisdiction and seeks the elimination of the Connally Amendment, to which our government still adhered at Bogota. The JOURNAL has criticized some of the proposals for "world government" as nebulous, confused, conflicting, divisive, impracticable in the present state of the world, and not conducive to a juridical order.

When a proposal is brought forward that is tangible and specific, even though highly controversial, we think it appropriate that lawyers should study, understand and discuss it. Of that character is the comprehensive draft of a Constitution for a Federal Republic of the World, prepared by a Committee headed by Chancellor Robert M. Hutchins, of the University of Chicago. This draft is analyzed and discussed by Ray Garrett, Jr., in this issue. We disagree with many of the premises of the draft; we think that it contains much that does not belong in any constitution and, insofar as it may belong anywhere, would be within the province and competence of domestic legislation. But the draft does pose the problems and the difficulties; it is something definite to discuss.

All of these issues should be faced and debated. Lawyers should lead, advise and guide on such issues, as they traditionally have done—the practicing lawyers and experienced judges, not merely the visionary agitators and ambitious radicals who are members of the Bar and the well-groomed lawyers who have been long on government payrolls. The issue before every country is between a dictatorship of the proletariat and constitutionalism, law and justice for the free nations and their peoples. There should be no closed minds, least of all among lawyers, as to ways and means of achieving peace and maintaining law and liberty. According as we cope with these issues which are peculiarly within our ken and skills, "we shall nobly save or meanly lose the last, best hope of earth". The slogan for days and years to come must be that so well put for us by General Omar Bradley:

> Wars can be prevented just as surely as they can be provoked. Therefore we who fail to prevent them must share in the guilt for the dead.

■ *In Behalf of Our Younger Lawyers*

We are increasingly concerned about the economic plight of many members of our profession, especially the younger men and women, but including more than a few of their seniors. This concern is based on what we see and hear—facts which leave the emergency in no doubt.

Legal fees and earnings have not nearly kept pace with the sharply rising costs of living and law office operation. Lawyers young and old have to pay much more for almost everything they buy; they have not generally been able to increase their fees or their volume of business to produce a proportionate rise in earnings. The lawyer who has lately left law school after devoting several years to the service of his country in uniform and has gone into a law office on a salaried basis for his start finds his pay much less, in most communities, than it costs him and his family to maintain decent minimum standards of living.

There have lately been numerous factual and statistical demonstrations, official and unofficial, that a reasonable budget for a family of four in the skilled wage-worker category is not less than $3000 to $3500, depending on the community; and it is common knowledge that "third-round" wage increases are being granted, under governmental and labor union pressure, to bring wage-workers well within that range. All this of course means further increases in prices and living costs, for professional and "white collar" people as well as the wage-workers. We should hardly expect our younger lawyers and their families to eke out substandard existence under conditions of hardship such as have been produced by the lack of housing and the spiralling costs of living. There are many young lawyers today who are able to stay in the profession and do its work only because their meager savings or parental assistance makes good the gap between what they are paid and what they have to spend to live.

The resultant problems in our profession are of course very difficult, and no one pattern for dealing with them can be suggested. Law office fees and earnings have not kept pace with living and other costs. Some firms and law offices can ill afford to pay their younger lawyers more than they are paying them; the seniors have their problems and perplexities along with the newcomers. Another and serious problem is the large number of young men and women who were graduated from law school in June. Many of them are trying desperately to get placed, and appear willing to take jobs at less than is being paid to the younger men already in the law offices.

The independence of members of our profession, young and old, is essential for the fulfillment of responsibilities to clients and the public. We do not want our younger lawyers driven out of law practice or into government jobs, by sheer economic privation. We cannot expect them long to subsidize their work for us. We cannot be content to leave them with a feeling that they suffer greatly because they have not collectively aligned government or a "pressure" organization on their side. The whole situation needs to be re-examined and dealt with, in each law office and community. Beyond a doubt, there are many cities and offices in which the younger lawyers, especially the newcomers to the Bar, are paid less than the minimum called for by present costs of living.

■ *Youth Correction Authority Act*

A fortunate development which most clearly emerged during the May meeting of the American Law Institute is that judges, law teachers and practicing lawyers of the country, mobilized under the experienced tutelage of the Institute, have achieved a notable contribution to the legislative means of coping with the problems of juvenile delinquency, pre-sentence investigation, indeterminate sentence, probation, parole, individual treatment of young offenders, crime prevention rather than routined punishment, etc., as an integrated statutory plan for the improvement of criminal justice through the Youth Correction Authority Act. The expert processes of study and draftsmanship under the leadership of the organized Bar, with members of our Association taking full part under the aegis of our distinguished affiliate, seem to have worked strikingly well and to be coming to a fruition delayed indubitably by the war.

California was the first State to enact the recommended legislation, in 1939. Minnesota and Wisconsin followed in 1947. Massachusetts was the first to adopt in 1948. At least a half dozen States, as reported in our account of the Institute meeting, are giving serious consideration to early enactment of the plan. Our Section on Criminal Law and Procedure has made its advocacy of the Act its principal project for the year.

The decisive factor is that the comprehensive plan has stood the test of practical experience. It is not "just another plan" for the shelves, files or wastebasket; *it works.* The Act deals with social problems which are a primary responsibility of the Bar because of their predominantly legal aspects. Lawyers have been and are being criticized sharply by the press and public for a supposed failure to do what they should to lessen juvenile delinquency and protect society. The answer to this criticism should be to invite and urge the press and public to unite with the Bar in bringing about the enactment of the Youth Correction Authority Act in every State.

We urge the members of the House of Delegates, and the influential members of our profession, to *get busy* in behalf of the earliest possible adoption of this tested plan in every commonwealth.

■ *Striking Down the Communities' Self-Protection*

When our forefathers commanded, in the First Amendment, that "Congress shall make no law . . . abridging the freedom of speech", the contemporary evidence indicates that they meant just that and no more. They had spent several years in studying their State Constitutions, which became a principal source of provisions for the organic law of the "more perfect Union"; they knew the extent to which the rights and freedoms of the people were protected under their State Constitutions; they wished to be certain and specific that no federal law could impair or interfere with what they had in their States and communities; e.g., "*the* freedom of speech". This they wish to retain, under the protection of their State Constitutions, laws and local regulations, and to forbid the Congress to pass a law interfering with it.

The right of free men to speak their views freely to those who were willing to listen was justly regarded as a cornerstone of liberty in a representative republic. Boston Common had been forerunner and symbol of public places in many communities where earnest men could mount a box or other improvised point of vantage and speak their minds to those who were willing to gather around them. Ideas and manner of speaking had to compete "in the market-place" for hearers. Freedom to listen or not to listen was looked on as a counterpart of "the freedom of speech".

It had occurred to no one then that insofar as free speech was manifested in harangues in public parks and places, the right was absolute or that the Constitution had put it beyond reasonable regulation and local police control to safeguard the rights of others from intrusion and offense. Restrictions that were arbitrary or discriminatory were often rejected by the community's sense of fair play, but there was recognized no right of anyone to speak at all times in any public place, regardless of the community's right to peace and order and other peoples' right to reasonable privacy and to carry on their own pursuits or pastimes without molestation.

Even as to that great tribune of "the soap-box", Boston Common, late in the last century, the Supreme Court of the United States had before it a decision written by Mr. Justice Holmes, then in the Supreme Court of Massachusetts, which upheld (162 Mass. 510) the constitutionality of an ordinance that forbade that on "any of the public grounds" any person "make any public address . . . except in accordance with a permit from the mayor". The great jurist denied that such a regulation was directed against "free speech generally . . . whereas in fact it is directed toward the mode in which Boston Common may be used". The Supreme Court affirmed (*Davis* v. *Massachusetts,* 167 U. S. 43). And in *Cox* v. *New Hampshire,* 312 U. S. 569, where a parade or procession for religious purposes was involved, Chief Justice Hughes for a unanimous Court

upheld a local requirement of licensing and regulation for such a parade or procession. Before technological advance had brought the perambulating sound-amplifier, and increasingly since, cities and towns have commonly passed local ordinances requiring permits and some supervision for organized assemblages and propaganda through use of public streets and parks, to the end that the police shall have advance information of such uses and also that unduly loud and disturbing noises shall not be made at unsuitable times and places.

Even since the Supreme Court has construed the Fourteenth Amendment to apply the First Amendment to State action and to mean that nothing provided in a State law or done by a State or locality under its authority shall offend against the Court's view of what is forbidden to Congress by the First Amendment, it has not hitherto been regarded that "freedom of speech" carries with it the right to compel others to hear regardless of their wishes or proscribes local police regulation of the use of public streets and parks by those who would plant blaring amplifiers on sound trucks to din others' ears with unsought views. The need for local police regulations for community protection has enormously increased since radio and loud-speakers have magnified the decibels of the human voice.

At this juncture comes the much-discussed five-to-four ruling of the Supreme Court on June 7 in *Saia* v. *People of the State of New York*, which may be regarded as reflecting the propensity which we discussed as to State laws in connection with the *Winters* case (May issue, page 410) and as to local arrangements and practices in connection with the *McCollum* case (June issue, page 482). The majority ruling in the *Saia* case denied the validity of a municipal ordinance which required the obtaining of a permit from the chief of police for the placing and operating of a sound truck and loud-speaker in a public park or street. The case involved a sound-truck operated by the religious sect known as Jehovah's Witnesses; but the majority opinion, as well as those in dissent, referred extensively to the use of sound trucks and loud-speakers in political campaigns and the consequent effects upon peace, quiet and privacy in the communities. "The sound truck has become an accepted method of political campaigning," said Mr. Justice Douglas for the majority.

The State of New York had by law empowered its cities to provide public parks for their citizens and to determine and regulate the use of such parks for public recreation and enjoyment. In the exercise of such powers, the City of Lockport (population about 25,000) passed an ordinance of the familiar type prohibiting generally the use of loud-speakers, sound trucks, radio devices, etc., in public streets and places. Section 3 made an exception in favor of the public dissemination, through such means, of "items of news and matters of public concern", upon obtaining a permit from the chief of police. The New York Court of Appeals, in upholding the constitutionality of the ordinance and the conviction for violation of it, construed the appellant's conduct to come within this exception, and the Supreme Court took the ordinance as construed by the State Courts.

The City of Lockport created and maintained a small park which was dedicated by deed to "park purposes exclusively". An area in it was set apart for the people's recreation and was provided with tables, benches, fireplaces, a playground and wading-pool for children, and space for such games as bowling, horseshoe pitching and "sandlot" baseball. The appellant minister of Jehovah's Witnesses operated loud-speakers atop his car, with a microphone some distance away at the point of oral delivery of his talks in the park, and connected them with wires across park space or a sidewalk (for which a municipal permit is usually required) to his car, which was placed on the street or in the park (closed to vehicles). The equipment and its operation were such as to carry his voice loudly to all parts of the park, to the many who did not wish to hear him and did not come to the park for that purpose, as well as to any who did. Some witnesses testified that they were annoyed by the sound, not by the contents, of the amplification; others were called who said they were not annoyed at all.

No discrimination against the appellant or his sect was shown. He had obtained one permit and operated under it; when it expired, he was not granted another, but continued to operate without it. The city maintained nearby a baseball field, with stands, which the Lutherans had recently used, under permit, for religious purposes. There was no evidence that the appellant would have been denied a like permit, but that location would have enabled him to address only those who wished to hear him. His resort to sound trucks was to be heard by all who had come to the park for its recreational purpose.

The majority opinion was by Mr. Justice Douglas, with Chief Justice Vinson and Justices Black, Rutledge and Murphy concurring. Mr. Justice Jackson wrote an emphatic dissent, on the ground that the decision seemed to him "neither judicious nor sound and to endanger the great right of free speech by making it ridiculous and obnoxious". Mr. Justice Frankfurter, with whom Justices Reed and Burton concurred, wrote for "the precious freedom of privacy" as to be balanced against "aural aggression" through "the blare of sound trucks". The experimental efforts of communities to protect reasonably their people against all manner of use of the new technological devices did not appear to these judges to be an unconstitutional curbing of "freedom of speech". Many experienced judges in State Courts have held the same view under the same constitutional provision. Have all of them, and all of the great judges who were in the Supreme Court when the *Davis* and *Cox* cases were decided, been blind that the First Amendment proscribes local police regulation of sound trucks?

One aspect of the majority ruling, as pointed out by Mr. Justice Jackson, is that it follows soon after that in the *McCollum* case, where the majority held that the First Amendment prohibits a State or city from permitting the use of tax-supported property "to aid religious groups to spread their faith", even where the school pupils and their parents asked for it and all religious faiths participated. In the *Saia* case, the majority holds that the same constitutional provision prohibits the restriction of the use of tax-supported property (a public park devoted to recreation) by one religious sect to force its preachments on the ears of parents, children and others, who have come to the park for family picnics and play.

The First Amendment was drafted in days when men relied on their native power of speech and the normal carrying-power of their voice to attract and hold those who were willing to listen to them. The new devices are for involuntary audition, insistent intrusion, "aural aggression", propaganda obnoxious to many. Within a few days after the *Saia* decision came down, Left Wing groups in New York City, refusing to obtain permits, placed and operated their sound trucks outside reading rooms of the New York Public Library and outside private clubs. What church, library, school, college, park, club, hospital, or home will be immune? The major political parties, from a long-run sense of propriety and discretion, will not be likely to offend often. The perambulating radical organizations will take full advantage of their newly-bestowed license to invade and deny others' rights to think, read, rest, sleep, and enjoy themselves undisturbed in their own way.

Although the majority decision invalidates at one stroke the existing ordinances and regulations in all or nearly all of the municipalities that have found need for protecting their people against amplifier and sound truck offending, it is of course true that the opinion speaks of "narrowly-drawn" statutes as possible means whereby municipal law officers and legislators may deal with abuses. Conceivably too much noise may still be a public nuisance; "noise can be regulated by regulating decibels", says the majority. "The hours and place of public discussion can be controlled." But the Court seems to give little or no guide as to how this can be done without coming within the condemnation visited on the Lockport ordinance. Evidently police department permits and supervision are outlawed; even a most moderate license fee may be outlawed. Commercial sound trucks for advertising purposes can probably still be controllable; the problems of draftsmanship come as to political and religious speeches and all manner of propaganda. The most consequential fact is that the ordinances and regulations by which countless communities have protected their people, with the full approval of the Courts of their State when challenge has been made, have been obliterated, on the eve of an unprecedented political campaign; and the prospect is that years will elapse before American municipalities can know with reasonable certainty what substitute measures they can enact and enforce to protect their people and assure them the "precious freedom of privacy".

Editorial From a Member of Our ADVISORY BOARD

■ *Is International Law the Right Name?*

Before the United Nations was organized, it seemed fair enough to speak of the existing law between the nations as "international law", although even then it might have been more accurate and wiser to talk about the "law of nations" rather than confess a weakness by speaking of the law "between nations" (international law). We are now members of the United Nations, and practically all the other nations of the world are either members or reasonably on their way to become members.

As we know it, international law grew up under the great hand of Grotius in the seventeenth century. It presupposed the personal sovereignty of the heads of highly nationalistic states. International law then dealt largely with matters of etiquette and the regulation of war among these highly sensitive despots. Modern nations, where the whole people make up the sovereignty of each, require a more complete law of nations covering these peoples in all their peace-time relationships; but the pattern of the personal sovereign has limited or almost frozen the development of an adequate law of nations since Grotius' time.

Now we have a territorial basis for international law, meaning the law that prevails on appropriate levels for all people and all the political units within the territorial limits of the United Nations. This is a fresh start. Now we can talk sense, on the basis of this world unit which we have already, and within which absolute sovereignty has at last been moderately and conservatively limited.

But the precedents of international law from the beginning and until two years ago are not based on territorial authority and presuppose capricious and absolutely separate states. Isn't it reasonable, after 200 years of inadequate legal equipment, that we should drop these antiquated croppings and enter fully into the actual and sensible law of peoples and of nations which we now actually possess?

PAUL SAYRE

Iowa City, Iowa

Each month a member of the Journal's Advisory Board is asked to contribute an editorial signed by him. In this way we hope to be able to reflect the many facets of opinion, and the active interests, of lawyers, judges, and teachers of law, in all parts of the United States. The views expressed by each contributor are his own, and are not necessarily those of the Advisory Board or the Board of Editors.

Editor to Readers

Wholly irrespective of partisan considerations, the JOURNAL expresses its pride and pleasure that a distinguished lawyer who has been a member of its Advisory Board since that representative and helpful aid to this magazine was created, and who was a member of the House of Delegates during 1940-41, and the Vice Chairman of our Association's Section of Criminal Law and Procedure since 1938, has been nominated by the national convention of his political party for the office of Vice President of the United States. The personal felicitations of those who have worked with Governor Warren in the House of Delegates and other Association activities are extended to him upon this high honor.

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Your Editor-in-Chief regrets that because of personal circumstances beyond his control the further analysis of Department of Commerce figures as to income and "take-home-pay" of lawyers and members of other professions, which was promised for this issue (see page 437 of our June issue), could not be completed in time for publication.

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Because of the demands of his duties as Director of the independent Survey of the Legal Profession, Reginald Heber Smith has resigned as Chairman of our Association's Committee which sponsored the legal section of the National Conference on Family Life. Judge Paul W. Alexander, of Toledo, Ohio, who as Vice Chairman of the Committee presented its widely commended report to the Conference (see page 448 of our June issue), has been designated as Chairman of the Committee for the remainder of the Association year. Communications concerning the report and work of the Committee should hereafter be addressed to Judge Alexander.

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In the opinion of more than a few members of our Association, the concluding paragraph of Ben W. Palmer's address before the Institute of Natural Law, which was quoted on page 508 of our June issue, is one of the most eloquent and moving utterances that has lately been made by an American lawyer. It is worth turning back to and treasuring. The whole address can be obtained in the March issue of *Notre Dame Lawyer* (see 34 A.B.A.J. 510; June, 1948).

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Speaking at the 1948 graduation exercises at the University of Virginia on June 14, David E. Lillienthal, Chairman of the United States Atomic Energy Commission, stressed the need that thoughtful and qualified citizens take a more active part in public affairs and in office-holding, and proposed "a fluid kind of citizen-service, in which men and women move from private life into public service for a period, then back to private life again. Thus we will have," he said, "private citizens experienced in public affairs, and public servants with judgment enriched by experience in daily problems of private affairs". As "a new philosophy" for the present generation, he urged the abandonment of a slogan of "look out for number one", and proposed as a substitute: "Be an Active, Living Part of Your Times". We welcome the accession of Mr. Lillienthal to the ranks of those who protest the philosophy under which the powers of government have been long used in furtherance of the monopoly powers and selfish interests of groups and classes intent on "looking out for number one" for members of those minorities or at least their leaders.

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At the opening session of the American Law Institute's 1948 meeting, after Mr. Justice Jackson had expressed informally in his remarks before beginning his prepared address, his hope that younger lawyers could be interested and enlisted sufficiently in the work of the Institute, to take the places of those who, like himself, and others present, had been engaged in it practically from the start, former President George Wharton Pepper, who was in the chair, responded that at its May meeting the Council of the Institute had disregarded what had commonly been its limitation of new members to lawyers 35 years old and more, and had filled its quota of recruits by taking in men who were below 35, a few even below 30, in order to assure both the representation of the younger lawyers and the training of those who would some day succeed to positions of leadership. In this action the Institute has only followed the trend which is manifest in many local and State Bar Associations, as well as in our Association, to move younger lawyers sooner into responsible posts and thereby prepare them for the highest offices and full leadership. "Alumni" of the Junior Bar Conference are almost everywhere moving up into conspicuous places in the Bar Associations. This is wise and imperative, and should become more general and extensive. The younger men should bear more and more of the brunt of the work while the wearied seniors from trying years are still available to counsel them. A first duty of the elders in every law office, we think, is to see to it, without delay, that every young lawyer in the place is enrolled as a member of our Association.

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And yet the enrollment of lawyers as members of our Association is not for the young or middle-aged alone. In the sunset of their years in the profession, many of its eldest are becoming aware that our Association is making the fight for things which they should support. And so they apply for membership. Your Editor-in-Chief looked through, the other night, a very recent

list of ninety-two lawyers proposed for membership—what seemed to be a typical list. Fourteen were less than 30 years old; seventeen more were between 30 and 35; twenty-four more were between 35 and 40; fourteen more were between 40 and 45. Thus sixty-nine of the ninety-two were less than 45 years old. Twenty-three of the ninety-two were older; fourteen were between 45 and 55; three were between 55 and 60; and six more were above 60 years of age. The oldest applicant on the list, a Seattle lawyer, had been born in 1869 and so will soon be 80 years old.

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Details of the plight of lawyers in a Communist-controlled country have been coming through to the New York *Times* and other publications from Belgrade in Yugoslavia. In our March issue (page 191) we quoted an official description of Communist "reorganization" of the profession to a collectivist basis. The Serbian Ministry of Justice decided and directed that many city and large-town lawyers should go to small agrarian communities to live and practice. The lawyers did not wish to leave their homes; probably the migrations were commanded as punishment for bourgeoise status and some independence of views. When all delaying tactics had failed, the lawyers quit their profession and sought jobs. The government-controlled Serbian newspaper, *Twentieth of October,* then said that the only way to defeat the lawyers' "machinations" was for the government to see to it that the lawyers could not get or hold other jobs.

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On the evening of May 24 an item in this department was cited by a candidate for nomination for the presidency as his authority for the constitutionality of the Mundt-Nixon bill before the Congress as to Communism and Communists. This took place on a nation-wide radio hook-up from Portland, Oregon; the speaker was former Governor Harold E. Stassen, of Minnesota, member of our Association since 1934, in his debate with Governor Thomas E. Dewey, of New York, member of our Association since 1935. Governor Stassen's reference was to the question and comment appearing on page 392 of our May issue. It was not prepared as a legal opinion on the constitutionality of a particular bill or a particular legislative program for dealing with the subject. As a protest against the assertion that it would be "unconstitutional" to deal with Communism and Communists by appropriate legislation, our comment speaks for itself.

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In his address at Toledo on May 14, before the Ohio State Bar Association of which Joseph D. Stecher of our Association was then the President, Senator Alexander Wiley, of Wisconsin, Chairman of the Senate Committee on the Judiciary and member of the Committee on Foreign Relations, discussed the work of the United Nations as to international law, and especially the need that international law be made protective of the basic rights of persons as well as of states, and said:

> Meanwhile, the American Bar Association as usual, has been in the forefront of evaluation and recommendation on this neglect of human rights. In the May, 1948 issue of the AMERICAN BAR ASSOCIATION JOURNAL, we have all undoubtedly read of the Bar's proposal for an *uncompromising* Convention or Covenant to fulfill obligations under Article 55 of the U. N. Charter so as to secure universal respect for human rights and for implementing of such a Covenant through an association of truly freedom-loving nations.

His reference, of course, was to the leading article in our May issue ("A Covenant of Free Nations: Shall They Agree on Basic Rights and Freedoms?", 34 A.B.A.J. 349).

The Duty of Americans Does Not Change With Time

"We are bound to maintain public liberty, and, by the example of our own system, to convince the world that order and law, religion and morality, the rights of conscience, the rights of persons and the rights of property may all be preserved and secured in the most perfect manner by a government entirely and purely elective. If we fail in this, our disaster will be signal, and will furnish an argument, stronger than has yet been found, in support of those opinions which maintain that government can rest safely on nothing but power and coercion. As far as experience may show errors in our establishments we are bound to correct them; and if any practices exist contrary to the principles of justice and humanity within the reach of our laws or our influence we are inexcusable if we do not exert ourselves to restrain and abolish them."

—DANIEL WEBSTER

At Plymouth Rock, Massachusetts, on December 22, 1820.

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Department of Legislation

Harry W. Jones, Editor-in-Charge

■ *Introductory Statement by the Editor-in-Chief:* We here start a department which will be devoted each month to developments in the field of legislative draftsmanship and organization—the largely neglected arts and skills of accuracy, adequacy, definiteness, clarity in the formulation of new legislation, and of amendments to existing laws, federal and State, as well as the organization and staffing of means by which those objectives can be attained and the legislative intent expressed beyond doubt or misconstruction. The *Journal* has been exploring the practicalities of such a department for several months; many circumstances and conditions—some of them will be "highlighted" in the May 20 address by Mr. Justice Robert H. Jackson, reported elsewhere in this issue—have appeared to make this a project which the *Journal* should undertake immediately in the interests of the public, the three branches of our federal government, the States, and the profession of law.

The new department will have the active assistance of the staff of the Legislative Drafting Research Fund of Columbia University, which Professor Joseph P. Chamberlain founded in 1911 for pioneering work in this field of law (see 34 A.B.A.J. 268; April, 1948), and which he, Thomas I. Parkinson, and others made the means of giving new emphasis to expertness in legislative draftsmanship. Professor Harry W. Jones, of the Columbia Law School, who has for several years been a large factor in the work of the Fund, will be our Editor-in-Charge and will have independent responsibility for the contents of the department. His introductory exposition is of the added responsibilities put on those who draft and enact laws by the Supreme Court decisions of the past decade as to the constitutionality of laws and the interpretations given as to legislative intent. Future contents of the department will be determined by Professor Jones and his experienced associates through experimentation and exploration as to what will be most serviceable to legislators, judges, lawyers and the public. An editorial in this issue discusses the founding of the department.

W. L. R.

The Drafting of Legislation in the Light of Congressional Responsibility for Constitutionality

■ During the last decade the Supreme Court has increasingly followed a policy of non-intervention in cases involving the constitutionality of federal and State statutes regulating economic activities. Congressional power under the commerce clause has been so broadly defined in cases since *Jones and Laughlin* that judicial review has virtually ceased to be a controlling factor in the development of federal legislative policies. The draftsman of a federal regulatory statute gives far less consideration than he did fifteen years ago to the question whether his proposed statute, if enacted, will stand up in the Courts against possible constitutional challenge. The draftsman's more pressing concern today is whether his proposal can be cast in a form acceptable to a majority of the members of the responsible standing committees of the House and Senate.

This department of the JOURNAL is to be concerned exclusively with developments in the field of legislation and legislative organization. It is not the purpose of this first article to register approval or disapproval of the movement in Supreme Court constitutional doctrine which has assigned almost a conclusive presumption of constitutionality to federal regulatory legislation. The point presently made here is that this lessening of the force of judicial review of legislation brings into sharper focus the responsibility of the Congress on issues of constitutional law. It is beyond reasonable dispute that our federal system of government has been brought closer than ever before to the English constitutional system of government, under which the Parliament, rather than the Courts, is the final effective forum for determination of the consistency of legislative proposals with the pattern of constitutional government.

The greater freedom of action which the Congress enjoys today as the result of the Supreme Court's less stringent standards of constitutionality carries with it a deepened Congressional responsibility. So long as Courts assert a broadly conceived prerogative in constitutional matters, it is perhaps inevitable that Congress gives only passing consideration to the long-range constitutional implications of specific regulatory measures. The *Congressional Record* is studded with instances in which serious constitutional misgivings, expressed on the floor of the House or Senate in the course of discussion of major bills, have been dismissed by the sponsors of the questioned legislation by the recital of some such formula as that "constitutionality is a question which it is for the Courts

HARRY W. JONES

to decide". Whatever may be thought of the legitimacy of so casual a Congressional approach to issues of constitutionality during periods when judicial action provided a close and continuing check on federal regulatory legislation, the survival of any such attitude in Congress would be indefensible under existing circumstances as to the scope and motivations of judicial review.

The primary, direct and inescapable responsibility of the Congress on issues of constitutional law stands out most clearly in relation to the problem of what are to be the appropriate areas of federal and State regulatory authority. Insofar as judicially enforced doctrines of constitutionality are concerned, there is hardly a major field of trade regulation in which State power is not today being exercised only at the sufferance of Congress. The Supreme Court has left it to Congress to determine the extent to which federal regulatory statutes shall apply to business activities which have some interstate contacts but are essentially local in character and significance. If the federal system is to survive as a way of government, the Congress must itself work out ways in which federal and State power can best supplement and reinforce each other.

Constitutionality cannot be brushed off as a question of exclusive judicial cognizance, for the mandates of the Constitution are addressed equally to the legislative and executive departments. Under the familiar doctrine of "political questions", many matters of profound constitutional significance have always been left by the Courts to conclusive determination by the legislative and executive departments. Judicial decisions have had little influence in such vital areas of constitutional law as the conduct of foreign affairs and the exercise by Congress of its spending power. But it seems to have taken the recent commerce clause and due process cases of the Supreme Court to bring home to American lawyers, in Congress and out of Congress, that a Senator or Representative does not discharge his constitutional responsibility merely by addressing himself to the question as to whether or not a proposed statute would be sustained by a Court in litigation as to constitutionality.

It is more essential than ever before in the history of our system of laws that Congress shall act with full awareness of all of the facts bearing on the long-range and the constitutional consequences of its specific legislative decisions and draftsmanship. Lawyers experienced in public law controversies have long made effective use of the methods of painstaking fact presentation first developed by Brandeis in due process litigation. But all of us are inclined to be Court-minded on constitutional issues and slow to recognize that the "Brandeis brief" is equally appropriate in the presentation of policy arguments to Congressional committees. Congress itself is the first forum for every issue of legislative constitutionality, and Congressional committees will benefit as much as do the Courts from an effective presentation of all the facts and the decisions and of all the considerations and points of view which must be taken into account in the determination of an issue of constitutional law, as well as of the public policy questions involved. This neglected field of professional usefulness stands as a challenge to American lawyers.

Our Association Opposes Confirmation of Nominee for U. S. District Judge in New York

■ Our Association's Committe on the Judiciary, through Chairman John G. Buchanan, of Pennsylvania, has notified Chairman Alexander Wiley of the United States Senate Committee on the Judiciary that our Association opposes the confirmation of Samuel H. Kaufman, whom President Truman has nominated to fill a vacancy in the office of United States District Judge for the Southern District of New York. The controversy which has raged as to the obtaining of much-needed judges in that district, through the filling of the vacancy and the creation of additional judges as recommended by the Association of the Bar of the City of New York and the vote of the House of Delegates (34 A.B.A.J. 343; April, 1948) continues for reasons which were indicated in our May issue (pages 397-398).

The vote in our Association's Committee in opposition to Mr. Kaufman was based in part upon like action by the Committee on the Judiciary in the Association of the Bar. The Attorney General of the United States had asked that Association for a report on two lawyers under consideration, one of whom was Mr.

(Continued on page 641)

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Results of Mail-Balloting By 10,250 Members for State Delegates

■ On June 10, 1948, the Board of Elections met at the Headquarters of the Association, canvassed the ballots, and announced the results of the balloting for State Delegates.

There were nineteen jurisdictions voting in the election this year. Eighteen of these elected delegates for the regular three-year term beginning at the conclusion of the next Annual Meeting of the Association. Two jurisdictions voted for delegates to fill vacancies for the term which expires in 1948, and one jurisdiction for a vacancy which expires in 1949.

In the nineteen jurisdictions voting, there were seven—namely, Connecticut, District of Columbia, Illinois, Mississippi, Texas, Washington and Wyoming—in which more than one candidate had been nominated by petition.

In Michigan, after the ballots had been mailed out, the Board learned of the untimely death of the sole nominee, W. Leslie Miller. This necessitated sending out a second ballot on which the members voting had to write in the name of the one they favored for the office.

AMERICAN BAR ASSOCIATION

Election for State Delegates — 1948

Jurisdiction	Delegate Elected	Ballots Mailed	Ballots Returned	Votes Received
Arizona	CHARLES H. WOODS, Tucson	246	116	99
	*CHARLES H. WOODS, Tucson	246	110	96
Connecticut	CYRIL COLEMAN, Hartford	703	480	259
District of Columbia	CHARLES S. RHYNE, Washington	1,781	847	571
	*CHARLES S. RHYNE, Washington	1,781	821	555
Illinois	STEPHEN E. HURLEY, Chicago	3,370	2,178	1,402
Iowa	JOHN D. RANDALL, Cedar Rapids	598	332	306
Maine	CLEMENT F. ROBINSON, Portland	180	115	112
Michigan	GLENN M. COULTER, Detroit	1,295	432	174
Mississippi	JOHN C. SATTERFIELD, Jackson	344	285	85
Montana	JULIUS J. WUERTHNER, Great Falls	179	111	98
Nebraska	GEORGE H. TURNER, Lincoln	430	266	251
New Jersey	WILLIAM W. EVANS, Paterson	1,254	605	575
New York	**GEORGE H. BOND, Syracuse	4,518	1,424	1,361
Oklahoma	A. W. TRICE, Ada	704	375	327
Puerto Rico	MARTIN TRAVIESO, San Juan	101	26	13
South Carolina	B. ALLSTON MOORE, Charleston	271	124	111
South Dakota	ROY E. WILLY, Sioux Falls	159	79	71
Texas	JAS. L. SHEPHERD, JR., Houston	1,499	999	758
Washington	ROBIN V. WELTS, Mount Vernon	672	458	287
Wyoming	H. GLENN KINSLEY, Sheridan	83	67	40

*To fill vacancy expiring with adjournment of 1948 Annual Meeting.
**To fill vacancy expiring with adjournment of 1949 Annual Meeting.

Of the delegates elected, eleven succeed themselves. The number of ballots sent out was 20,414. The total number of ballots returned was 10,250.

BOARD OF ELECTIONS
EDWARD T. FAIRCHILD, CHAIRMAN
WILLIAM P. MACCRACKEN, JR.
HAROLD L. REEVE

MANUSCRIPTS FOR THE JOURNAL

■ The Journal is glad to receive from Association members any manuscript, material, or suggestions of items, for consideration for publication. Preponderantly, our columns are filled with articles planned and solicited by members of the Board of Editors or Advisory Board or written by them; but each issue contains articles selected from those submitted to us by others. With our limited space, we can publish only a few of those submitted; but every article we receive is considered carefully by members of the Board of Editors unless for some reason it is plainly unsuited for our publication. Articles in excess of 3000 words including footnotes cannot ordinarily be considered; exceptions are sometimes made as to solicited contributions. Communications from members on subjects of interest to the profession are invited, and will be published if and when our limited space permits. They should not exceed 300 to 350 words in length; if they do, the Board of Editors may reject or condense. The facts stated and views expressed in any article identified with an individual author are upon his responsibility.

As the work of the Board of Editors is carried on by men who are widely separated in distance and busy in their own professional pursuits, time often elapses before a decision can be made as to whether a proffered article is acceptable and space can be made available for it. We cannot assure that submitted manuscripts not accepted will be returned, although that may usually be done.

Review of Recent Supreme Court Decisions

APPEAL AND ERROR

Judgment not final which directs producer and marketer of natural gas to take gas ratably from producer in same field under terms to be fixed

■ *Republic Natural Gas Company* v. *Oklahoma*, 92 L. ed. Adv. Ops. ; 68 Sup. Ct. Rep. 972; 16 U. S. Law Week 4408. (No. 134, decided May 3, 1948.)

Republic has been taking gas from the Hugoton gas field, partly in Oklahoma, since 1938. In 1944 Peerless Oil and Gas Company completed a gas well in a portion of the field otherwise tapped only by Republic, but had no market or means of transporting gas to any market. It offered to sell the gas to Republic, which refused it. On Peerless' application the Commission issued an order requiring Republic to take such gas from Peerless "ratably", i.e., to take the same proportion of the natural flow of Peerless' well as Republic took of the natural flow of its own wells. The terms and conditions of the taking were to be agreed upon by the two companies, but in the event of failure to agree the terms were to be fixed by the Commission. The Oklahoma Supreme Court affirmed.

On appeal to the Supreme Court, invoking both the due process and the equal protection clauses the appeal was dismissed on the ground that it was not a final judgment or decree. Mr. Justice FRANKFURTER delivered the prevailing opinion.

Mr. Justice DOUGLAS concurred with opinion; Mr. Justice RUTLEDGE dissented, joined by Mr. Justice BLACK, Mr. Justice MURPHY and Mr. Justice BURTON, stating that he would entertain jurisdiction and affirm the judgment. H.

The case was argued by Robert M. Rainey and John F. Eberhardt for Republic and Earl Pruet for Oklahoma.

APPEAL AND ERROR

Emergency Price Control Act—Emergency Court of Appeals—Methods of Review

■ *Woods* v. *Hills*, 92 L. ed. Adv. Ops. 978; 68 Sup. Ct. Rep. 992; 16 U. S. Law Week 4446. (No. 437, decided May 10, 1948.)

The validity of a rent reduction order, issued under the Emergency Price Control Act, was in issue. On trial in the District Court, judgment was entered for defendant on the ground that the administrator had failed to establish the validity of the order. Under the Act exclusive jurisdiction to pass upon the validity of the regulation was vested in the Emergency Court of Appeals and on review in the Supreme Court. The administrator did not appeal, however, until after the Emergency Price Control Act expired on June 30, 1947. The Court of Appeals for the Tenth Circuit therefore certified certain questions to the Supreme Court.

The CHIEF JUSTICE for a unanimous Court held that the District Court was precluded by the Act from determining the validity of the regulation, and that jurisdiction of the Emergency Court would have been preserved by terms of a saving clause in the Act, although the Act itself expired June 30, 1947, were it not for an amendment added to the Act by the Supplemental Appropriation Act, 1948, which the Court held eliminated defendant's right to ask for leave to file a complaint against the administrator in the Emergency Court. The Court held, however, that although this remedy was barred, the amendment did not impair the right to have a review of the order by filing a protest with the administrator, denial of which would be reviewable in the Emergency Court of Appeals. A.

The case was argued by John R. Benney for Woods and George D. Rathbun for Wills, *pro hac vice*.

Lower Court Powerless To Allow Interest Where Mandate of Appellate Court Is Silent

■ *Briggs* v. *Pennsylvania Railroad Company*, 92 L. ed. Adv. Ops. 1018; 68 Sup. Ct. Rep. 1039; 16 U. S. Law Week 4454. (No. 530, decided May 24, 1948.)

Plaintiff, an administratrix suing under the Federal Employers' Liability Act, obtained a verdict for $42,500 in the District Court, but the court granted a motion to dismiss the complaint for lack of jurisdiction. The Court of Appeals for the Second Circuit reversed and remanded with direction that judgment be entered on the verdict. When the District Court did this, it added interest from the date of the verdict to the date of the judgment, although the mandate of the Circuit Court of Appeals was silent on this point. No motion to recall and amend the mandate was made to the Circuit Court of Appeals during the term. Defendant's motion to resettle so as to exclude the interest was denied by the District Court. Upon appeal, the Circuit Court of Appeals modified the judgment to exclude the interest, and certiorari was taken.

The Supreme Court held, in an opinion by Mr. Justice JACKSON, that the interest was rightly excluded since an "inferior court has no power or authority to deviate from the mandate issued by an appellate court".

Mr. Justice RUTLEDGE, joined by Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice MURPHY,

Reviews in this issue by E. J. Dimock, James L. Homire, and Richard B. Allen.

dissented on the ground that the amount of interest to be included in the District Court judgment depended not upon the mandate of the Circuit Court of Appeals but upon the effect of R. S. §966 (28 USC §811). A.

The case was argued by Sol Gelb for Briggs and William J. O'Brien, Jr., for the Pennsylvania.

Appellate Court's Power To Issue Mandamus Extends to Include Writ To Require Enforcement of Mandate To Lower Court

■ *United States* v. *United States District Court for the Southern District of New York,* 92 L. ed. Adv. Ops. 1013; 68 Sup. Ct. Rep. 1035; 16 U. S. Law Week 4467. (No. 527, decided May 24, 1948.)

The Government brought suit under the Sherman Act against the Aluminum Company of America. After trial the district court dismissed the complaint. Alcoa appealed directly to the Supreme Court, but four justices were disqualified, the Court was consequently without a quorum, and the case was transferred to a special docket and postponed until a quorum could be obtained. Thereafter, on June 9, 1944, Congress amended the provision for direct appeals in antitrust cases (15 USC Supp. V, §29) to provide that in such a contingency the Supreme Court certify the appeal to the Court of Appeals of the circuit in which is located the district wherein the suit was brought, where a special court composed of three senior judges of the circuit would hear the appeal. The Supreme Court then certified the Alcoa case to the Court of Appeals of the Second Circuit, which heard the appeal, reversed the judgment of dismissal, remanded the case for further proceedings, but left open the question of remedies.

Upon remand the District Court enjoined certain practices, but deferred action on the Government-requested dissolution of Alcoa on the ground that the intervention of the war since the evidence was taken and the pending disposition of aluminum plants and facilities by the Surplus Property Administrator might provide Alcoa with ground for contending that it no longer had a monopoly on the aluminum ingot market. The court's judgment specifically provided that Alcoa might make such an application. Subsequently Alcoa filed a petition with the District Court praying for a final judgment that it no longer had a monopoly, and the question was set for trial. The United States then filed this petition for mandamus in the Circuit Court of Appeals to require the district judge to vacate so much of his order as reserved jurisdiction to enable Alcoa to apply for a determination that a monopoly no longer existed. The Circuit Court of Appeals considered that under the Act of June 9, 1944, its jurisdiction was limited to the original appeal certified to it by the Supreme Court since the Supreme Court now had a quorum to consider any subsequent appeal. For this reason and since the term in which its mandate was handed down had expired, it held that it had no power to issue the requested writ of mandamus.

The Supreme Court, in an opinion by Mr. Justice DOUGLAS, reversed, holding that the Circuit Court of Appeals had jurisdiction to consider the petition for writ of mandamus since such jurisdiction was an exercise of appellate jurisdiction or in aid thereof, and that such jurisdiction would attach no matter whether the Circuit Court of Appeals had anything to do with further appeals in the case itself.

Mr. Justice FRANKFURTER concurred specially in a separate opinion; Mr. Justice MURPHY and Mr. Justice JACKSON took no part in the case. A.

The case was argued by Leonard J. Emmerglick for the United States and William Watson Smith for the District Court.

CARRIERS

Commodities Clause of Interstate Commerce Act—*Elgin, Joliet and Eastern* Case Affirmed

■ *United States* v. *South Buffalo Railway Company,* 92 L. ed. Adv. Ops. 777; 68 Sup. Ct. Rep. 868; 16 U. S. Law Week 4343. (No. 198, decided April 26, 1948.)

The Government sought the reconsideration and overruling of the interpretation of the commodities clause of the Interstate Commerce Act as announced in *U. S.* v. *Elgin, Joliet and Eastern R. Co.,* 298 U. S. 492. It had there been held that the prohibition against a railroad company's transporting any commodity which it owns or in which it has an interest, except for its own use, does not prevent it from transporting commodities of a corporation whose stock is wholly-owned by a holding company which also owns all of the stock of the railway, unless the control of the railway is so exercised as to make it the *alter ego* of the holding company.

In an opinion by Mr. Justice JACKSON the Supreme Court declines to overrule the challenged decision. Reliance is placed chiefly on the subsequent legislative history in this field, as indicating that Congress has not concluded that the prior interpretation was wrong or that the law should be changed.

Mr. Justice RUTLEDGE delivered a dissent, in which Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice MURPHY joined. In this opinion the position is taken that the *Elgin* case was wrong, that the Court should correct the error itself, and that the subsequent legislative history does not support the conclusion of the majority as to the views of Congress. H.

The case was argued by Philip B. Perlman for the United States and Bruce Bromley for the railroad.

COMMERCE

Interstate Commerce Act—Mergers of Railroad Corporations—Rights of Dissenting Stockholders

■ *Schwabacher* v. *United States,* 92 L. ed. Adv. Ops. ; 68 Sup. Ct. Rep. 958; 16 U. S. Law Week 4378. (No. 258, decided May 3, 1948.)

The Interstate Commerce Commission approved the merger, under Section 5 of the Interstate Commerce

Act, of the Chesapeake & Ohio, a Virginia corporation, and the Pere Marquette, a Michigan corporation. Minority preferred stockholders of the Pere Marquette contended that the merger amounted to a liquidation or winding up of the Pere Marquette and that they were entitled to the liquidation terms of the par value plus five per cent cumulative dividends, since the terms of merger allowed something to the Pere Marquette common. On this basis the Pere Marquette preferred holders would receive $172.50 a share, as there was an accumulation of unpaid dividends of $72.50 a share.

The Commission, thinking it lacked jurisdiction to determine the question of the compensation of dissenting stockholders, approved the terms of the merger and left that question to negotiation or litigation in the courts. A specially constituted District Court in Virginia sustained the Commission's order.

On appeal, with the opinion being delivered by Mr. Justice JACKSON, the Court held that no rights alleged to have been granted to dissenting stockholders by state law provisions concerning liquidation survive the merger agreement approved by the commission as just and reasonable, but the judgment was reversed and remanded to the Commission to consider the extent to which minority stockholders' rights under state law may affect the intrinsic or market value of their shares.

Mr. Justice FRANKFURTER dissented, expressing the view that the judgment should be affirmed. He was joined by the CHIEF JUSTICE and Mr. Justice BURTON.

Mr. Justice REED did not participate. H.

The case was argued by Carl McFarland for Schwabacher and by Daniel H. Kunkel and George D. Gibson for the ICC and Chesapeake & Ohio, respectively.

CONSTITUTIONAL LAW

Equal Protection Clause—Civil Rights—Enforcement of Restrictive Covenants Against Use of Land by Negroes

■ *Shelley* v. *Kraemer; McGhee* v. *Sipes,* 92 L. ed. Adv. Ops. 845; 68 Sup. Ct. Rep. 836; U. S. Law Week 4426. (Nos. 72 and 87, decided May 3, 1948.)

■ *Hurd* v. *Hodge; Uricolo* v. *Same,* 92 L. ed. Adv. Ops. 857; 68 Sup. Ct. Rep. 847; 16 U. S. Law Week 4432. (Nos 290 and 291, decided May 3, 1948.)

In Nos. 72 and 87, the Supreme Court reversed judgments of the Supreme Court of Missouri and the Supreme Court of Michigan, which had sustained the validity of restrictive covenants on real estate restricting it from use by Negroes, and enforcing the covenants by judicial relief.

The opinion of the Court was delivered by the CHIEF JUSTICE. It was grounded on the equal protection clause of the Fourteenth Amendment. The Court, though recognizing that restrictive covenants may stand when supported by voluntary adherence by private parties, concluded that their enforcement by state judicial action violates the equal protection clause. The argument that judicial enforcement of the covenants does not amount to state action was rejected.

In Nos. 290 and 291, the enforcibility of restrictive covenants was raised as to the District of Columbia. The petitioners placed primary reliance on the Fifth Amendment as a bar to the covenants. The Supreme Court, in an opinion by the CHIEF JUSTICE, declared the covenants unenforcible as in violation of Section 1978 of the Revised Statutes, derived from Section 1 of the Civil Rights Act of 1866, and the CHIEF JUSTICE stated that, aside from statute, "enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States".

Mr. Justice FRANKFURTER in Nos. 72 and 77 concurred separately.

Mr. Justice REED, Mr. Justice JACKSON and Mr. Justice RUTLEDGE did not participate in any of the four cases. H.

No. 72 was argued by George L. Vaughn and Herman Willer for Shelley and Gerald L. Seegers for Kraemer; No. 87 was argued by Thurgood Marshall and Loren Miller for McGhee; Nos. 290 and 291 were argued by Charles H. Houston and Phineas Indritz for Hurd and Uricolo; Nos. 87, 290 and 291 were argued by Henry Gilligan and James A. Crooks for Sipes and Hodge.

CRIMES

New York Constitutional Requirement of Grand Jury Indictment in Infamous Crimes—Fourteenth Amendment Is Not Violated by Plea of Guilty to and Judgment on Lesser Offense If Defendant Is Apprised of Specific Charge

■ *Paterno* v. *Lyons,* 92 L. ed. Adv. Ops. 1035; 68 Sup. Ct. Rep. 1044; 16 U. S. Law Week 4471. (No. 583, decided June 1, 1948.)

Petitioner was indicted in New York in 1936 for knowingly receiving stolen goods. Upon an agreement with the district attorney he later pleaded guilty to and was given a suspended sentence for attempted grand larceny second degree. Eight years later, in order to avoid the effect of New York's second felony offender law in regard to another crime to which he had pleaded guilty, petitioner made a motion in the nature of *coram nobis* to set aside the original conviction and for leave to plead *de novo.* He contended that under the procedure in the first case he had been denied his right under the New York Constitution to be prosecuted for an infamous crime only by indictment of a grand jury, and that he had also been denied due process of law under the Fourteenth Amendment. The county judge agreed with this contention, but petitioner was prevented from vacating the judgment when the state obtained a writ of prohibition from the Supreme Court of Erie County, and this was affirmed through the Court of Appeals of New York.

The Supreme Court affirmed in an opinion by Mr. Justice BLACK. The Court of Appeals' decision that acceptance of petitioner's plea of guilty to attempted grand larceny second degree under an indictment charging knowing receipt of stolen goods did

not violate the state's constitutional provision requiring indictment by a grand jury for infamous crimes was held to be conclusive. Petitioner's allegation that the state had failed to provide him with an available remedy to attack his conviction was also rejected since he had failed to avail himself of several remedies provided under the state's procedure. Mr. Justice BLACK also found no merit in the contention under the Fourteenth Amendment that petitioner was indicted for one offense and that the judgment was based on an entirely separate offense, since petitioner was given reasonable notice and information of the specific charge and a fair hearing in open court.

Mr. Justice FRANKFURTER concurred separately, but stated his opinion that no substantial federal question had been raised by petitioner and that the writ of certiorari should be dismissed.

Mr. Justice DOUGLAS dissented.

A.

Sentence—Federal Sentence Expressed To Begin at Expiration of State Sentence Begins When Prisoner Is Paroled by State

■ *Hunter* v. *Martin,* 92 L. ed. Ops. 912; 68 Sup. Ct. Rep. 1030; 16 U. S. Law Week 4457. (No. 643, decided May 24, 1948.)

While petitioner Martin was serving a three-year state sentence, he was convicted and sentenced in a federal court to concurrent ten-year terms, the judgment providing that the sentence should "begin to run at the expiration of the sentence now being served . . ." Before the expiration of the term of his state sentence, petitioner was paroled and delivered to federal authorities. He brought a petition for a writ of habeas corpus, contending that his federal sentence did not begin to run until the completion of the full term of his state sentence and that he was therefore entitled to freedom during the parole period. The District Court denied the writ, but the Court of Appeals for the Tenth Circuit reversed.

The Supreme Court dismissed petitioner's claim for freedom, holding that the state sentence had expired "insofar as it was an obstacle to service of the federal sentence". The deferment clause of the federal sentence was viewed as only a method of preventing a conflict between the state and federal governments. Mr. Justice JACKSON wrote the opinion for a unanimous Court. A.

The case was argued by W. Marvin Smith for Hunter and James F. Reilly for Martin.

HABEAS CORPUS

Use To Require Prisoner's Presence To Argue Own Appeal—Abuse of Writ

■ *Price* v. *Johnston,* 92 L. ed. Adv. Ops. 993; 68 Sup. Ct. Rep. 1049; 16 U. S. Law Week 4457. (No. 111, decided May 24, 1948).

Petitioner was convicted of bank robbery in a federal district court in 1938. This action is his fourth petition for a writ of habeas corpus. The first, sought in 1940, alleged, among other things, that petitioner was convicted through the use of false testimony, but did not aver the prosecution's knowing use of such false testimony. The petition was dismissed on its merits without a hearing. In 1942 petitioner brought his second petition for a writ of habeas corpus. In addition to the grounds of his first petition he alleged two new grounds, but again failed to charge, either in his petition or at the subsequent hearing, that the Government knowingly used false testimony, and the petition was dismissed. The third petition, filed in 1945, was denied on the ground that the issues raised were known to the petitioner when he filed his earlier petitions, making the third petition an abusive use of the writ of habeas corpus. Finally, in amending his fourth and present petition in 1946, petitioner alleged that the Government "knowingly employed false testimony". The District Court denied the fourth petition without a hearing and without opinion, although respondent did not deny the allegation that false testimony was knowingly used.

On appeal, the Court of Appeals for the Ninth Circuit assigned the case for rehearing *en banc.* Petitioner moved for an order directing his appearance for the reargument. A majority of the court held, however, that circuit courts of appeals are without power to order the production of a prisoner for the argument of his appeal in person. The court then, recognizing that petitioner had injected a new ground into the proceedings, affirmed the District Court's denial of the writ on the ground that "Where there have been repeated petitions with an apparent husbanding of grounds the onus may properly be cast on the applicant of satisfying the court that an abusive use is not being made of the writ".

The Supreme Court, in an opinion by Mr. Justice MURPHY, reversed and remanded. Making an extensive review and examination of the writ of habeas corpus, he held that circuit courts of appeals have the power under Section 262 of the Judicial Code (28 USC §377) to issue an order in the nature of a writ of habeas corpus commanding that a prisoner be brought to the courtroom to argue his own appeal. The issuance of such a writ is discretionary. The Court further held that in view of the allegations made by petitioner there was no abuse of the process of habeas corpus. The case was then remanded to the District Court for a hearing, in which the Court pointed out, petitioner could develop his allegation and the Government could meet this and bring into focus whatever elements it believed constituted an abuse of the writ.

Mr. Justice FRANKFURTER, joined by the CHIEF JUSTICE and Mr. Justice REED, filed a dissenting opinion. Mr. Justice JACKSON also dissented with opinion. A.

The case was argued by Joseph L. Rauh, Jr., for Price and Frederick Bernays Wiener for Johnston.

MONOPOLIES

Anti-Trust Laws—Sherman Act—Activities of Theater Chains as Violations—Appropriate Remedies in Decree

■ *United States* v. *Griffith*, 92 L. ed. Adv. Ops. 864; 68 Sup. Ct. Rep. 941; 16 U. S. Law Week 4386. (No. 64, decided May 3, 1948.)

■ *Schine Chain Theaters* v. *United States*, 92 L. ed. Adv. Ops. 871; 68 Sup. Ct. Rep. 947; 16 U. S. Law Week 4402. (No. 10, decided May 3, 1948).

These were companion cases.

In the *Griffith* case the defendants (four affiliated corporations and two individuals) had interests in motion picture theaters in eighty-five towns, 62 per cent of which were closed towns, i.e., towns in which there were no competing theaters. The complaint charged that master agreements had been executed among the defendants and film distributors in which the buying power of the entire Griffith circuit was used to obtain certain exclusive privileges, such as the prevention of competitors from obtaining enough first- and second-run films to operate successfully, preemption in the selection of films and the receipt of clearances[1] over competing theaters. The Government alleged that this constituted violation of Sections 1 and 2 of the Sherman Act.

The District Court found that no conspiracy existed, that there was no intent or purpose unreasonably to restrain trade or to monopolize, that the situation described was the result of lawful competitive practices, and dismissed the complaint.

The Court, in an opinion by Mr. Justice DOUGLAS, stated that "The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful". As to the question of intent, the Court said that one who uses the buying power of his entire circuit to negotiate films for his competitive as well as his closed towns, is using monopoly power to expand his empire and is "chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did". It added: "The consequence of such a use of monopoly power is that films are licensed on a non-competitive basis in which would otherwise be competitive situations." The Court held that the linking of closed towns with competitive towns provided the Griffith associates with the use of monopoly power to obtain exclusive privileges from film distributors and that having conspired to obtain those monopoly rights, they had violated Sections 1 and 2 of the Act.

The District Court was therefore reversed and the case remanded to it for the framing of an appropriate decree.

Mr. Justice FRANKFURTER dissented.

In the *Schine* case the defendants (a parent company, five wholly-owned subsidiaries and three individuals) were charged with substantially the same violations of the Sherman Act as in the *Griffith* case, 79 per cent of the towns in which they had theaters being closed towns. Here, though, the District Court found a conspiracy to violate the Sherman Act, and entered a decree enjoining certain practices and requiring a divestiture by Schine of various of its theaters.

The Court, with Mr. Justice DOUGLAS again delivering the opinion, affirmed in part, reversed in part, and remanded the case to the District Court for further proceedings. The Court felt that certain findings were not clear and directed the District Court to proceed further with them. As to the problem of divestiture, the District Court did not provide for dissolution through separation of the several affiliated corporations, but required Schine to sell its interest in certain selected theaters, the sale to be consummated under a trustee. The Court did not approve this portion of the decree because it failed to differentiate between theaters lawfully acquired and those unlawfully acquired. Upon remand, the District Court was directed to make findings as to the acquisition, and to order divestiture of theaters "obtained by practices which violate the anti-trust acts". The Court approved, among others, that portion of the decree by which Schine was prohibited from acquiring financial interest in additional theaters except upon an "affirmative showing that such acquisition will not unreasonably restrain competition".

Mr. Justice FRANKFURTER concurred in the result. Mr. Justice MURPHY and Mr. Justice JACKSON took no part in either case. A.

No. 64 was argued by Robert L. Wright for the United States and Charles B. Cochran for Griffith; No. 10 was argued by Bruce Bromley for Schine and Robert L. Wright for the United States.

1. A clearance is a period time agreed upon which must elapse between runs of the same feature within a particular area or in specified theaters.

TAXATION

United States—Priority of Debts Due United States in Insolvency — Social Security Act

■ *Massachusetts* v. *United States*, 92 L. ed. Adv. Ops. 719; 68 Sup. Ct. Rep. 747; 16 U. S. Law Week 4325. (No. 157, decided April 19, 1948.)

The construction of two statutes was involved. R.S. §3466 provided that "the debts due the United States shall be first satisfied". Section 902 of Title 9 of the Social Security Act provided that the taxpayer might credit against federal Title 9 taxes his contributions under an approved state social security program to the extent of 90 per cent of such Title 9 taxes. An insolvent Massachusetts taxpayer, owing federal capital stock taxes, federal Title 8 taxes, federal Title 9 taxes, and Massachusetts social security taxes, made an assignment for benefit of creditors. The funds in the estate were less than the total of all of the federal taxes but more than the total of the federal capital stock and federal Title 8 taxes. The assignee paid the Massachusetts social security taxes in full and sought priority for the amount paid or at least credit against the last 90 per cent of the federal Title 9 tax. The Court of Appeals for the First Circuit held that the United

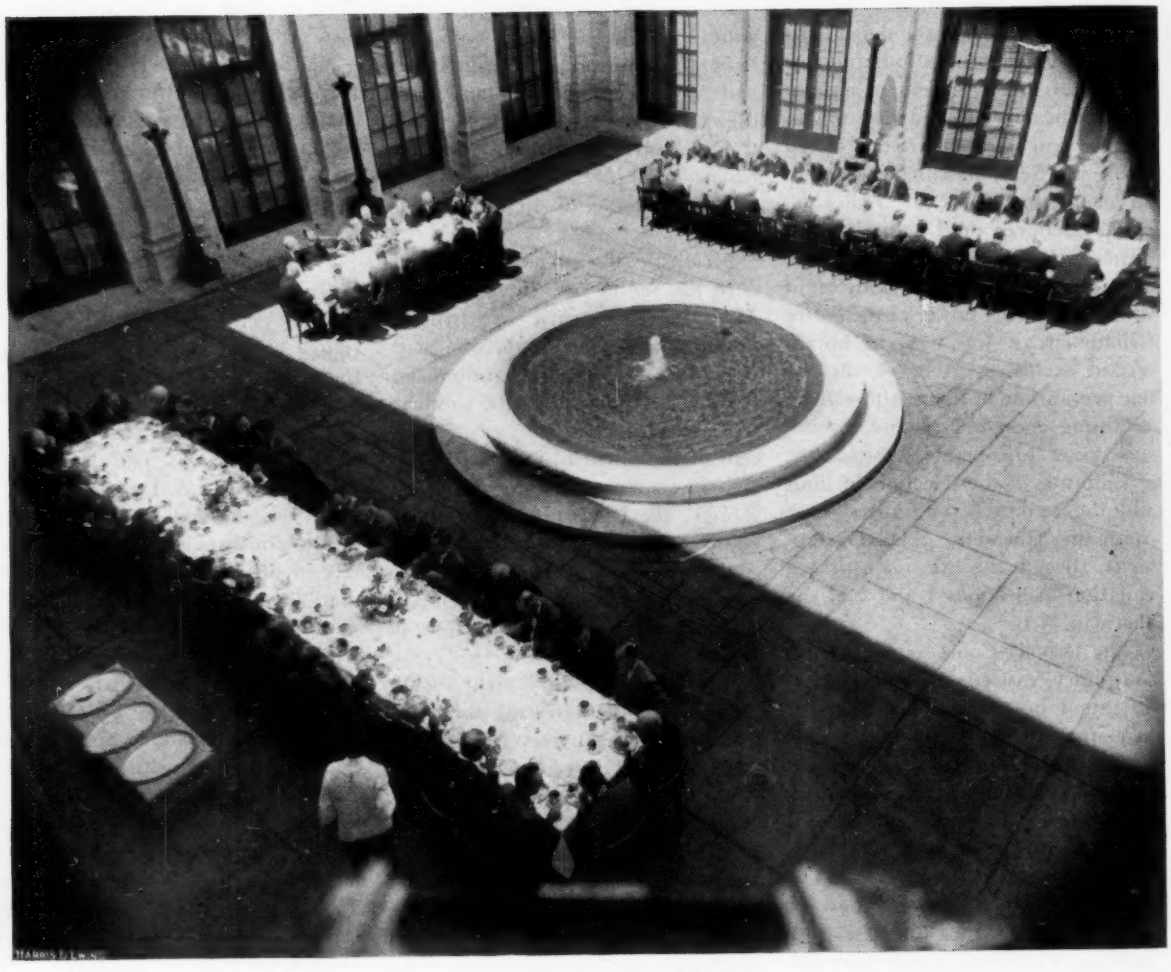
States was entitled to priority for the full amount of its claims including the full Title 9 tax.

The Supreme Court, in an opinion by Mr. Justice RUTLEDGE, held that its decisions in *Illinois* v. *U. S.* 328 U. S. 8, and *Illinois* v. *Campbell*, 329 U.S. 362, which it reconsidered and approved, committed it to affirmance of the instant case.

Mr. Justice JACKSON delivered a dissent, in which Mr. Justice FRANKFURTER, Mr. Justice DOUGLAS and Mr. Justice BURTON concurred, expressing inability to see the commitment in the cases relied upon, or to see why he "should be consciously wrong today because . . . unconsciously wrong yesterday", and voting to allow federal priority only subject to the 90 per cent credit. D.

The case was argued by Alfred E. Lo Presti for Massachusetts and Helen Goodner for the United States.

Unusual View of Supreme Court Building



DID YOU KNOW THAT the classic edifice of the Supreme Court of the United States has an attractive interior patio with a flowing fountain? Even some members of the Court did not, until May 21, when, through the courtesy of Thomas E. Waggaman, Marshal of the Court, the National Conference of Judicial Councils held its annual luncheon in the bright sunshine of this patio. The above is a view of the scene. At the tables are the Chief Justice and a majority of the members of the Court, numerous Chief Judges and Chief Justices of State Courts, and several of the best-known American lawyers in public office and private practice—all assembled under the presidency of Laurence M. Hyde, Associate Justice of the Supreme Court of Missouri and a member of our House of Delegates, all intent on devising ways and means of improving further the administration of justice. You may need a magnifying glass to identify persons. Practically everyone of the ninety present is a member of our Association. Informal speakers were Mr. Justice Rutledge of the Supreme Court and Presiding Justice David W. Peck, of New York's Appellate Division for the First Department.

Courts, Departments and Agencies

E. J. Dimock . . EDITOR-IN-CHARGE

Administrative Law . . Administrative Procedure Act . . hearing required by Deportation Act without express statement . . agency ruling that prosecuting officials may act as examiners "final" so as to permit judicial review.

■ *Eisler* v. *Clark*, U.S.D.C., D.C., May 5, 1948, Goldsborough, A. J.

The Administrative Procedure Act provides: "Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, . . . (c) . . . No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall . . . participate . . ." Plaintiffs sought injunctive relief against the conduct of deportation proceedings against them before examiners who had acted as prosecuting officials against them. The injunction was granted. In answer to the contention that the wording of the Deportation Act did not require a hearing and that the quoted provisions of the Administrative Procedure Act therefore did not apply to deportation proceedings, the Court, in an oral opinion, declared that a hearing as embodied in the concept of due process had been judicially read into the Deportation Act and was as integral a part of the Act as if there was express provision to that effect.

Section 10 (c) of the Administrative Procedure Act provides that every "final" agency action for which there is no other adequate remedy in any court shall be subject to judicial review. The Court dismissed the claim that the question as to the correctness of the Government's procedure in these deportation cases was an interlocutory matter that could not be passed upon until completion of the proceedings. In the Court's opinion the issue was fundamental and it was "more or less ridiculous" to say that the matter should await the end of the proceeding.

Administrative Law . . Administrative Procedure Act . . FCC . . §9(b) of the Administrative Procedure Act affording "an opportunity to achieve compliance" in cases of license revocation is not applicable to proceedings for renewal of license.

■ *In re Northern Corp.*, File No. BR-833, April 28, 1948. (Digested in 16 U. S. Law Week 2534, May 11, 1948.)

The FCC by letter directed petitioner to file, prior to November 14, 1947, application for renewal of its broadcasting license (which would not expire until May 1, 1948), and indicated the probability of a hearing to ascertain whether petitioner had in previous years submitted inaccurate information as to its stock ownership and corporate financing. Petitioner filed the requested application and simultaneously filed a "Petition to Conform Procedure to Provisions of Section 9 (b) of the Administrative Procedure Act", asserting that the required early filing was in contravention of §§309 (a) and 312 (b) of the Communications Act, and failed to provide petitioner with "opportunity . . . to demonstrate or achieve compliance with all lawful requirements" as required by §9 (b) of the Administrative Procedure Act.

Petitioner's argument based on the Communications Act, as interpreted by the FCC opinion, was that the FCC is authorized to determine whether or not a renewal hearing shall be held only by inspection of the renewal application; if the FCC has reason, derived from independent sources, to believe the licensee has violated law or regulation, the FCC may institute revocation proceedings, but cannot prior to the renewal application make a preliminary determination that a renewal hearing shall be held and require the filing of the application so as to facilitate that hearing. The FCC maintained that such an interpretation of the Act imparted an undue mechanical rigidity to FCC procedure, and held that the Act did not preclude the FCC from forming a "reasonable preliminary judgment . . . on the basis of sources other than the application" that a renewal hearing might be appropriate.

The FCC also held invocation of §9 (b) of the Administrative Procedure Act to be "misconceived", since "the provision of 9 (b) . . . relating to affording of 'an opportunity to achieve compliance' is applicable to revocation and other proceedings looking toward termination of a license before its expiration, and is not applicable to proceedings for renewal of license". A contrary interpretation was said to be unjustified by the wording and legislative history of the Act, and undesirable since it "would vitiate the principle of licensee responsibility and the standard of public interest as applied in renewal proceedings". The opinion

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EDITOR'S NOTE: The omission of a citation to United States Law Week or to the appropriate official or unofficial reports in any instance does not mean that the subject matter has not been digested or reported in those publications.

suggests that determination of whether a broadcasting station has been operated in the public interest must be made largely after the event, and that an "opportunity to achieve compliance" is therefore meaningless for license renewal purposes.

Army and Navy . . Armed Services Procurement Act . . regulation establishing uniform procurement policies for the Departments of the Army, Navy and Air Force.

■ *Armed Services Procurement Regulation,* Secretaries of the Army, Navy and Air Force, May 19, 1948. (Digested in 16 U. S. Law Week 2560, May 25, 1948.)

The Armed Services Procurement Regulation establishes for the Army, Navy and Air Force Departments uniform policies relating to the procurement of supplies and services under the authority of the Armed Services Procurement Act of 1947. This regulation, of which the first three sections have been published, became effective on May 19, 1948, and applies to all subsequent purchases and contracts which obligate appropriated funds. It is inapplicable, however, to any contract formalizing a preliminary contractual agreement made prior to May 19, 1948, or to any amendment of a contract made prior to that date, except where an amendment provides for the new or additional procurement of supplies or services.

Procurement by means of formal advertising and procurement by negotiation are the two principal methods authorized by the regulation. Although procurement is generally to be effected by advertising for bids, negotiation is permitted under certain circumstances as set forth. Coordinated or interdepartmental procurement is also approved. Competitive proposals are to be solicited from all qualified sources of supplies or services in the interest of obtaining the most advantageous government contract. As far as possible, supplies are to be obtained from surplus property held by disposal or other agencies; however, a fair proportion of the total procurement is to be placed with small business concerns.

Inter alia, the published sections of the regulation deal with the requirements for formal advertising procurement; the solicitation and submission of bids; contract awards; the circumstances permitting procurement by negotiation; the prerequisites to entering into contracts by negotiation; the approved types and use of negotiated contracts; and the authority for making advance payments under such contracts.

Army and Navy . . officer on terminal leave held to be on active duty and subject to jurisdiction of courts martial.

■ *Hironimus* v. *Durant,* C.C.A. 4th, May 4, 1948, Soper, C. J.

The question on appeal was whether a commissioned United States Army officer who is on terminal leave is amenable to military jurisdiction and may be tried and convicted by a general court martial for a violation of the Articles of War committed during active service, if the terminal leave is revoked before it expires and the prosecution is thereafter begun. The Circuit Court of Appeals reversed the order of the District Court which, on the ground that Mrs. Durant's active status had ended when her terminal leave began so that the military court was without jurisdiction, had granted a writ of habeas corpus (33 A.B.A.J. 1219; December, 1947). The Court was of the opinion that petitioner remained on active duty during the period of her terminal leave and until her prosecution was begun, and that therefore the court martial had jurisdiction to try and convict her. Reference was made to various rulings by the Judge Advocate General that officers on terminal leave remained on active duty and subject to the Army's disciplinary regulations. The benefits and advantages enjoyed by an officer on terminal leave were enumerated, all indicating continuance of active status. It was said that the rulings of the Judge Advocate General were ratified by the Armed Forces Leave Act (10 USC §18) passed August 9, 1946, after Mrs. Durant's leave had expired, which expressly directs, in connection with the accrual of two and a half days' leave for each month of "active service", that "leave taken prior to discharge before or after August 9, 1946, shall be considered as active military service".

Referring to the lower court's finding that petitioner's duty was technically active "for pay purposes only" but otherwise inactive, the Court stated that the reason for the continuance of petitioner's status, so long as it was lawful, was immaterial. It declared: "We find no reasonable justification for the view which asserts the existence of an active status so real that an officer may enjoy the accrued leave which he has accumulated, but denies its actuality as a basis for the prosecution of crimes committed during his period of service".

The Court expressly left open the question whether petitioner, even if on inactive duty, could not have been lawfully recalled to active duty for discipline.

Civil Service . . loyalty program . . dismissal of government employees found to be members of the Communist Party or the German-American Bund is mandatory under §9A of the Hatch Act . . dismissal of members of other organizations found to be subversive discretionary.

■ *Opinion of the Attorney General,* May 27, 1948.

In an opinion addressed to the chairman of the Loyalty Review Board, the Attorney General ruled that dismissal of government employees who are found to be members of the Communist Party or the German-American Bund is mandatory under §9A of the Hatch Act. This section makes it unlawful for federal employees "to have membership in any political party or organiation which advocates the overthrow of our constitutional form of government in the United States". The legislative history of the provision, as well as executive action taken to bar members of these parties from govern-

ment service, was said to indicate that the Communist Party and Bund are within the scope of §9A.

The opinion states that where an employee is dismissed on the basis of such proscribed membership, the Loyalty Review Board is required to determine whether or not he was accorded the procedural rights and privileges to which he was entitled, and whether there was evidence to support the agency board's finding; if both answers are in the affirmative the board must affirm the dismissal. In other dismissal cases predicated upon membership in organizations designated as totalitarian, fascist, Communist or subversive under Executive Order 9835, the Board is ruled to be invested with discretion to determine further whether there are reasonable grounds for a belief that the party involved is disloyal to the government. Such a determination will serve as the basis for the Board's recommendation for dismissal or retention.

Commerce . . ferry company operating boats wholly within state engaged in interstate commerce where pier reaches another state.

■ *Ex Parte No. 167*, ICC, May 11, 1948.

The Commission, on petition of the American Trucking Association, Inc., instituted an investigation for the purpose of determining whether the Delaware-New Jersey Ferry Company performed transportation in interstate or foreign commerce and, if so, whether application of the provisions of Part III of the Interstate Commerce Act was necessary to carry out the national transportation policy. Section 302 (i) (1) of Part III of that Act defines the term "interstate or foreign transportation" as used therein as "transportation of persons or property—(1) wholly by water from a place in a State to a place in any other State . . .". The ferry company operates a ferry across the Delaware River between piers built out from the Delaware and New Jersey shores. The Delaware boundary is at low water mark on the New Jersey shore so that the operation of the boats takes place entirely within Delaware. The only function of the ferry company in getting passengers and vehicles on and off the boats is to furnish the necessary walks, roads and piers.

The Commission held that the ferry company was performing transportation in interstate comerce, saying that the words "wholly by water" in the Act were inserted to distinguish between transportation wholly by water and that performed partly by water and partly by railroad or motor vehicle, and pointing out that the company's land facilities on the east side of the river were in New Jersey. It was said that "the traffic, here under consideration, is accepted for transportation from a point in one State to a point in another". On the second question, however, the Commission held that the application of the Act was not necessary to carry out the national transportation policy.

Constitutional Law . . personal, civil and political rights . . regulation of apartment house owner having effect of barring Jehovah's Witnesses ministers from houses unless presence desired by tenant reasonable and not violative of Constitutional rights.

■ *Watchtower Bible and Tract Society, Inc.* v. *Metropolitan Life Insurance Co.*, N. Y. Ct. App., April 22, 1948, Desmond, J.

Plaintiff Society, the governing body of Jehovah's Witnesses, and three ministers of that body brought suit against the private proprietor of a development of "interrelated" apartment houses to have it adjudged that defendant's regulation prohibiting within the apartment buildings any form of canvassing, vending, peddling, soliciting or distribution, unless consented to by either the manager or tenant, infringed plaintiffs' constitutional rights in propagating their religious beliefs. Upon the complaints of numerous tenants as to the frequent and persistent visits of the Witnesses, defendant had instructed its guards to prevent them from going into or through the buildings. The lower court held defendant's regulation reasonable and valid and not in violation of any of plaintiffs' rights since it allowed their visits to any tenant indicating a willingness to receive them. Witnesses entering in contravention of the regulation were deemed trespassers whom defendant had the right to remove.

The Court was in full agreement with the decision below, differentiating between the right of a religious group to preach, pamphleteer or otherwise promote its religious beliefs on streets, sidewalks, other public places or even the privately owned streets between the "interrelated" apartment houses, and the privilege of entering upon private residential property for such a purpose. The Court also adverted to the fact that the ministers were allowed inside the buildings whenever a tenant expressed such a desire. Since this regulation was held reasonable, the Court expressly left open the question whether the First and Fourteenth Amendments and the corresponding sections of the New York Constitution had anything to do with such regulations.

Department of Labor . . Wage and Hour Division . . statement as to the scope and applicability of the overtime exemption of employees subject to hours-of-service fixing power of ICC.

■ Code of Federal Regulations, Ch. V, Subch. B, Pt. 782, §§782.0-782.8 (13 Fed. Reg. 2346).

The Administrator of the Wage and Hour and Public Contract Divisions, Department of Labor, published in the *Federal Register* of April 30, 1948, his construction of the law with respect to the scope and applicability of the overtime exemption provided by §13 (b) (1) of the Fair Labor Standards Act (FLSA) with respect to employees as to whom the ICC has power to establish qualifications and maximum hours of service under §204 of the Motor Carrier Act of 1935. This statement, which supersedes prior advisory interpretations, is legally controlling under certain circumstances insofar as the

rights and liabilities of employers and employees are concerned.

Section 13(b) (1) of the FLSA provides an exemption from the maximum hours and overtime requirements of §7 of the Act. This exemption is said to be applicable, under the decisions of the United States Supreme Court, to those drivers, drivers' helpers, loaders or mechanics who are employed by motor carriers subject to the jurisdiction of the ICC under said §204 of the Motor Carrier Act, and whose work activities directly affect the "safety of operation" of motor vehicles on the public highways in transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act. Safety of operation refers to the "safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce, and that alone". An employee in any of the four defined classes who is called upon to perform, either regularly or intermittently, "safety-affecting" work of the type described "comes within the exemption in all work-weeks when he is employed at such job", regardless of the proportion of his time or activities actually devoted to such work, and even though in particular weeks he may not be so engaged. Examples of classes of employees to whom the exemption is inapplicable are given. The Administrator stated that it will be assumed for enforcement purposes that the interstate commerce requirements of the §13 (b) (1) exemption are satisfied where a motor carrier driver, driver's helper, loader or mechanic is engaged in transportation which, although confined to a single state, is part of an interstate movement so as to constitute interstate commerce within the meaning of the FLSA.

International Law . . where extradition treaty with Greece gave to state appealed to the right to determine citizenship of alleged fugitive, determination by Greece that petitioner was its citizen requires recognition of subsequent Greek conviction based on such citizenship.

■ *Coumas* v. *Superior Court of San Joaquin County,* Calif. Supreme Ct., April 23, 1948, Spence, J. (Digested in 16 U. S. Law Week 2550, May 18, 1948.)

Petitioner, a Greek national who became a naturalized United States citizen, fled to Greece in 1932 to avoid arrest for two crimes committed by him in California. The Greek government forbade his extradition on the ground that under its expatriation laws he had never divested himself of Greek citizenship, and that by virtue of its extradition treaty with the United States neither country was bound to deliver up its own citizens. Tried and convicted by a Greek Court in accordance with local laws which provided for the trial of Greek citizens for crimes committed abroad and punishment as if committed in Greece, he served consecutive terms of imprisonment for the respective crimes. Upon his subsequent return to California petitioner was arrested and held to await trial on the original charges against him, whereupon he sought a writ of prohibition restraining respondent court from proceeding with his scheduled trial on the ground that it was forbidden by §793 of the California Penal Code which provides that "when an act charged as a public offense is within the jurisdiction of another state or country, as well as of this state, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this state".

The Court recognized Greece's determination that petitioner was a Greek citizen, saying that a provision in an extradition treaty with Greece that "the State appealed to shall decide whether the person claimed is its own citizen" effectively countervailed any argument that would permit disregard of Greece's law under which petitioner might still be deemed its citizen.

The Court held that Greece had jurisdiction of petitioner's person under its qualified expatriation laws because it had never consented to his expatriation, and of the offenses because of its penal law, and hence that his conviction by a Greek court barred subsequent trial in California courts for the same offenses. The claim that petitioner's trial and conviction in Greece were collusive was rejected on the facts.

Intoxicating Liquors . . Constitutional law . . Fourteenth Amendment is not contravened by ordinance limiting employment of women as bartenders but permitting their employment in other liquor-dispensing capacities.

■ *Anderson* v. *City of St. Paul,* Minn. Supreme Ct., May 7, 1948, Peterson, J.

A municipal ordinance prohibited the employment as bartenders of women other than taproom licensees, the wives of licensees, or managers for licensees in the armed forces. Employment of women in liquor-dispensing capacities other than bartending was permitted. The Court, by a four-to-three decision, sustained the ordinance as constitutional and held that it did not deprive women of due process or equal protection.

The majority opinion relied principally on the premise that liquor-selling is a privilege subject to regulation virtually at the discretion of the regulating officials. Prohibition of women bartenders was held a proper exercise of the police power in regulation of the retail "on-sale" liquor business. The Court found no unconstitutional discrimination against certain classes of women in the relaxation of the inhibition as to the three designated classes or in the omission to prohibit participation by women in other liquor-dispensing activities. *Brown* v. *Foley,* 29 So. (2d) 870, was disapproved with the statement that the situation in Florida was anomalous.

The minority maintained that the regulation, while perhaps sustainable had it been a statute rather than an ordinance, was unreasonable, oppressive and discriminatory, designed to preserve employment for men, and lacking justification on any theory that women behind bars are productive of more evil than women elsewhere in the barroom.

Labor Law . . elections . . section 14(b) of the Labor-Management Relations Act precludes union shop elections among employees in states where union shops are banned by state law.

■ *In re Giant Food Shopping Center, Inc.*, No. 5-UA-57, NLRB, May 21, 1948.

Employer and petitioner, the bargaining unit for certain employees, sought an election under §9 (e) (1) of the Labor-Management Relations Act to determine whether the employees concerned desired a union shop (i.e., union membership required after thirty days employment). The regional director of the NLRB refused to hold such election on the grounds that, since some of the employees worked in Virginia, one of the nineteen states which prohibit the union shop, the election would be purposeless and the bargaining unit was therefore inappropriate.

On appeal, the NLRB sustained the regional director. The Board held that §9 (e) (1) was governed by §14 (b), which reads: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law". The Board maintained that, if union shop elections were permitted in states where the union shop is illegal, the Board might be placed in the position of having to accept a violation of state law as a defense to an unfair labor practice complaint brought by an employee discharged for failure to join the union.

Chairman Herzog and Member Houston, dissenting, maintained that the majority opinion was unsound in that, without a clear-cut Congressional expression, it made an offense under state law also a federal offense, since the employer and the union abiding by a union shop contract in violation of state law are precluded from legitimatizing their position under federal law by holding a §9(e) (1) election.

United States . . Federal Tort Claims Act . . claims against the United States by military personnel for service-connected disabilities are excluded from coverage of Federal Tort Claims Act.

■ *Jefferson* v. *U. S.* U.S.D.C., Md., May 7, 1948, Chesnut, D. J.

Plaintiff veteran brought suit under the Federal Tort Claims Act (28 USC §921, *et seq.*) to recover for injury sustained during his Army service as a result of the alleged malpractice of an Army medical officer. The Court found the alleged malpractice to be a fact, but held that the Federal Tort Claims Act did not cover plaintiff's case because his was a service-connected disability compensable under veterans' legislation.

Although §410 (a) of the Act waives the sovereign immunity of the United States with respect to "any claim against the United States for money only", without words of limitation as to classes of persons who may make the claim, Chesnut, D. J., ruled that an implied exception excludes claims made by members of the Armed Forces for service-connected injuries. Support for this conclusion was found in the special relationship existing between the United States and members of its military forces, and in the large body of extant federal legislation providing redress for service-incurred disabilities. It was further noted that §410 (a) makes the test of liability "the law of the place where the act or omissions occurred", and provides that "the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances"; it was inconceivable, in the Court's opinion, that Congress intended that the law of the state should govern the government-soldier relationship, which is exclusively federal in character, or that the government's liability in this respect could be analogized to that of a private individual.

War . . National Service Life Insurance Act . . "sister" includes an adoptive sister.

■ *Carpenter* v. *U. S.*, C.C.A. 3d. May 17, 1948, Goodrich, C. J. (Digested in 16 U. S. Law Week 2563, May 25, 1948.)

The adoptive sister of a deceased Army officer claimed the installments under his National Service Life Insurance policy which remained unpaid at the death of his adoptive parents, the designated beneficiaries. Section 602 (h) (3) of the National Service Life Insurance Act of 1940 provides: "Any installments certain of insurance remaining unpaid at the death of any beneficiary shall be paid in equal monthly installments . . . (D) if no widow, widower, child, or parent, to the brothers and sisters of the insured . . .". The insured was an orphan and left no widow or child. The District Court held that plaintiff was not a qualified claimant to the unpaid insurance within the intent of the statute.

The Court stated: "From all we can glean from the materials and canons usually employed to ascertain such intent, Congress probably did not have a conscious awareness of the problem," and said that therefore it must examine the policy emanating from the statute and other statutes relating to servicemen "in the light of the dominant contemporaneous opinion regarding the status of adoptive persons".

It met the argument that the omission of a provision in favor of adoptive sisters must have been purposeful since such a provision had appeared in the insurance act applicable in the first world war, by pointing out that the bill for the Act of 1940 was referred to a committee in the House of Representatives which was not the one to which other problems concerning benefits and insurance for members of the armed forces were referred but was the committee considering the Revenue Act of 1940, and that the bill was reported out as part of the Revenue Act with only one page of a sixty-four page report devoted to it.

As indicating a general policy to treat adoptive persons the same as relatives by blood, the Court stated

that, by a 1942 amendment, the definitions contained in §601 of the 1940 Act were expanded so as to provide, in addition to the original provisions in subdivision (e): "The term 'child' includes an adoptive child", a new subdivision (f): "The terms 'parent', 'father', and 'mother' include a father, mother, father through adoption, mother through adoption . . ." and that, in the legislation providing for the support of those dependent on enlisted personnel (37 USC §220), the terms "brother" and "sister" include brothers and sisters through adoption. The Court found a tendency in state legislation and informed sociological opinion to place the adopted person in the same relationship to the kindred of the adopting person as if related by blood instead of adoption.

The Court held that, in line with that tendency, plaintiff was entitled to be considered in every respect the sister of the insured, and reversed the judgment.

War . . veterans' housing . . veteran may recover from builder the over-ceiling excess paid by veteran for house built with diverted priority materials . . enforcement of Second War Powers Act not limited to criminal proceedings and injunctions.

■ *Heinicke* v. *Parr*, C.C.A. 6th, May 24, 1948, Martin, C. J.

Defendant builders allegedly diverted building materials, obtained under a Civilian Production Administration priority for veteran's homes, to construction of a dwelling which was eventually sold to plaintiff, a veteran, for more than fifty per cent above the ceiling price established in the permit issued pursuant to the Second War Powers Act and Priority Regulation 33. The District Court dismissed, for failure to state a cause of action, plaintiff's suit to recover the excess price paid from the builders and two intermediate grantees.

The Act and the Regulation subject to criminal penalties and injunction any person who sells at over-ceiling price a house built with priority materials. Defendants relied on the principle that statutory remedial causes of action do not arise by implication from a criminal penalty. The Circuit Court, however, maintained that the situation was appropriate for application of equitable principles, since "the veteran's only adequate remedy would be recovery of the excess amount paid by him over the ceiling price". Reference was made by way of analogy to *Porter* v. *Warner Co.*, 328 U.S. 395, where the court decreed restitution of excess charges under the Emergency Price Control Act of 1942.

As to the builders, the Court deemed it immaterial that they had not procured a CPA priority for the dwelling in question, since it was similar in construction to the houses to which the priority applied and from which they had diverted priority materials. Plaintiff's burden, on trial, would be to establish the fact of diversion.

If liability of the intermediaries was not established on the trial, the Court stated that it would be appropriate to assess against the builders the entire award for the excess paid.

Workmen's Compensation . . conflict of laws . . stipulation by parties that Pennsylvania Workmen's Compensation Law shall govern their rights and obligations ineffective where that law is inapplicable by its terms.

■ *Duskin* v. *Pennsylvania-Central Airlines Corp.*, C.C.A. 6th, April 14, 1948, McAllister, C. J. (Digested in 16 U. S. Law Week 2542, May 11, 1948.)

An action brought in Tennessee against an airline to recover damages for the death of one of its co-pilots in a plane crash in Alabama on an interstate flight from New York was dismissed on the ground that the Pennsylvania Workmen's Compensation Law, applicable by the terms of deceased's employment contract, fixed the amount of recovery for accidental death and barred tort action against the employer. On appeal, this decision was reversed and the case remanded for trial on the merits.

The contract of employment was executed in Washington, D. C., at a time when deceased was domiciled in Oklahoma and temporarily resident in Tennessee. The airline, a Delaware corporation, had its principle office in the District of Columbia. The decedent's duties included flying over the whole length of the state of Pennsylvania and every flight required a junction stop at Pittsburgh. By far the greater portion of his flying service was over that state as compared with any other state. Defendant maintained three operating bases in Pennsylvania, employing 250 persons at its Pittsburgh base.

The Court reasoned that even if none of the elements of the contract were "referable" to Pennsylvania, the courts should enforce the contract stipulation that the employment relation was to be governed by the laws, including the Workmen's Compensation Law, of Pennsylvania, there being no showing that the stipulation contravened the policy of Tennessee, the District of Columbia or Alabama. It was said that there was no more reason why the parties should not stipulate that the laws of a particular jurisdiction should govern their rights and obligations than for precluding them from stipulating as to the interpretation of their contract. Defendant's contention that, in view of the stipulation, the contract should be construed to substitute for a claim for tort damages an agreement to pay the amount provided by the Pennsylvania Workmen's Compensation Law was rejected in favor of the interpretation of their agreement as a mere stipulation that the contract is governed by the Pennsylvania compensation act. The Court, however, held that, since the Pennsylvania act was by its terms inapplicable to "accidents occurring outside" Pennsylvania except "accidents occurring to Pennsylvania employees whose duties require them to go temporarily beyond the territorial limits of the Commonwealth, not over ninety days" (§101), the Act was no bar. The Court pointed out that the exception was made only in the case of those "temporarily beyond the territorial limits of the Common-

wealth" and said that even if the decedent had been a Pennsylvania employee the Pennsylvania act would not have applied in this case. The parties by their contract were held to have adopted the Pennsylvania conflict of laws rule, which referred the parties to "the law of the place where the operative facts occurred," i.e., Alabama.

Further Proceedings in Cases Reported in this Division.

The following action has been taken in the United States Supreme Court:

Affirmed, June 7, 1948: *Estin* v. *Estin*—Constitutional Law (33 A.B.A.J. 721, 1223, July, December, 1947; 34 A.B.A.J. 155, February, 1948); *U. S.* v. *Columbia Steel Co.*—Monopolies (34 A.B.A.J. 154, 155; February, 1948).

Reversed and Remanded, May 3, 1948: *FTC* v. *Morton Salt Co.*—Commerce (33 A.B.A.J. 822, August, 1947; 34 A.B.A.J. 241, March, 1948).

Certiorari Denied, May 10, 1948: *North Pier Terminal Co.* v. *ICC*—Public Utilities (34 A.B.A.J. 240; March, 1948).

Certiorari Denied, June 7, 1948: *Time, Inc.* v. *Hartmann*—Libel and Slander (34 A.B.A.J. 153, February, 1948); Judgments (34 A.B.A.J. 322, 324; April, 1948).

The following action has been taken by the United States Court of Appeals for the Fourth Circuit:

Reversed, May 4, 1948: *Hironimus* v. *Durant*—Army and Navy (33 A.B.A.J. 1219; December, 1947; page 604 of this issue).

Practising lawyer's guide to the current LAW MAGAZINES

ADMINISTRATIVE LAW—*"Revision of the Securities Act":* In the April number of the *Columbia Law Review* (Vol. 48—No. 3; pages 313-340), Nathan D. Lobell analyzes major problems arising under the Securities Act of 1933 and the proposals and counterproposals of the Securities and Exchange Commission and representatives of the securities industry for legislation to meet those problems. Mr. Lobell describes his article as "narrow in subject matter [but] . . . intended to be broad in purpose: to give a test-tube demonstration of the interaction between regulation and custom; to show what 'administrative behavior' and 'administrative experiment' are like". In line with this purpose, he points out that the history of the administration of the Securities Act demonstrates this interaction and mutual give-and-take between regulation and custom, and that the possibilities of acceptable revision of the Act are based on the premise that the aims of adequate disclosure and efficient distribution are not contradictory and that the difficulties seem to be in adjustment rather than in the irreconcilability of positions. (Address: Columbia Law Review, Kent Hall, New York 27, N. Y.; price for a single copy: $1.00.)

ARBITRATION—*"The Arbitration Award and the Non-Resident: Nuance in New York":* In a thoroughly-documented article in the April issue of the *Columbia Law Review* (Vol. 48—No. 3; pages 366-391), Tobias Weiss discusses jurisdictional difficulties which arise in carrying out arbitration agreements where the contestants reside in different States. The greater part of Mr. Weiss' exposition is devoted to an analysis of Section 1450 of the New York Civil Practice Act and the decision in *Bradford Woolen Corporation* v. *Freedman,* 189 Misc. 242, which construed that section as conferring jurisdiction on the New York Courts, not only to compel submission to arbitration, but also to enforce the arbitration award against the non-resident party. Pointing out that Section 1450 is ambiguous on the point as to enforcement of the award and that there is grave uncertainty as to the validity of a statute which requires consent by a non-resident to such jurisdiction, Mr. Weiss concludes that "the only safe course for parties to follow at present is to make adequate equivalent provision in their arbitration agreements". (Address: Columbia Law Review, Kent Hall, New York 27, N. Y.; price for a single copy: $1.00.)

BANKRUPTCY—*"Proposed Bankruptcy Amendments: Improvement or Retrogression?"—"Proposed*

Editor's Note

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the *Journal* will endeavor to supply, at a price to cover cost plus handling and postage, a planograph or other copy of a current article.

Amendment of Section Sixty of the Bankruptcy Act": The leading article, entitled as above, in the March number of the *Yale Law Journal* (Vol. 57—No. 5; pages 683-723), presents the objections of Professor James William Moore, of the Yale Law School, and Philip W. Tone, a graduate fellow of that School, against certain bills pending in Congress for amendments to the Chandler Act of 1948. The authors take particular exception to the proposal to amend Section 60. In this respect, they are at odds with our Association and the National Bankruptcy Conference. They summarize their position by stating that "The bona fide purchaser test as expounded by the Supreme Court in the *Klauber* case and by the Third Circuit in the *Rosen* case is sound and should be retained". They urge also that the Borah Act should be retained and that "Piecemeal revision of the Bankruptcy Act is not desirable and an adequate overhauling of the Act is not feasible at this session of Congress". Appended to the article is a digest of the so-called non-controversial amendments proposed by H.R. 5693.

In the "Comments" section of the same issue of the *Yale Law Journal* (pages 828-854) a detailed study of the operation of Section 60 is given. It may not be surprising that the conclusion of the student commentator as to the undesirability of amending Section 60 is consistent with the point of view of Professor Moore in the leading article. (Address: Yale Law Journal, 127 Wall Street, New Haven, Conn.; price for a single copy: $1.00.)

CIVIL SERVICE—*"Loyalty Tests and Guilt by Association":* Few acts of government in this country have evoked as much controversy as those related to safeguarding the departments of government against disloyal employees and those who are poor "security risks". Much will be written on the propriety and constitutional basis for the President's Loyalty Order of March 21, 1947. Sincere and patriotic men have differed and will continue to differ, as to this and other direct measures against subversive groups.

The annual address at the meeting of the New York State Bar Association in January of 1948, given by the straight-thinking John Lord O'Brian, of the New York and District of Columbia Bars, as reprinted in the April issue of the *Harvard Law Review* (Vol. LXI—No. 4; pages 592-611), is important because of the high professional standing of the author and also because, with clarity and conciseness, it views the current controversy with the perspective of experiences of earlier years. Mr. O'Brian warns against the secrecy of evidence upon which charges of disloyal associations may be based. He suggests the need for a careful review of all existing measures to ascertain whether "the inevitable effect of all these so-called loyalty tests is to place some new degree of constraint upon the thought as well as upon the utterance of the individual". (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: $1.10.)

CONSTITUTIONAL LAW—*"The Dynamic American Bill of Rights":* Constitutional questions brought to the fore by the Mundt-Nixon bill pending before the Congress makes particularly timely the article by Hayden C. Covington, of the New York Bar, in the April issue of the *Canadian Bar Review* (Vol. XXVI—No. 4; pages 638-670). The author traces the origin and development of the "clear and present danger" test, first formulated by Mr. Justice Holmes in his dissent in *Schenck* v. *United States* (1919), 249 U.S. 47, which later became of paramount importance in determining the true scope of the First Amendment. Mr. Covington demonstrates in a clear and impressive way how the invention and utilization of the judicial doctrine of "clear and present danger" enabled the Courts to protect effectively individual personal freedoms against encroachment of government, whether State or federal. The application of the doctrine in cases involving the Espionage Act and the series of cases brought by Jehovah's Witnesses, points up the conclusion arrived at by the author, that in the final analysis "the dynamic power of the American Bill of Rights springs not only from the term of the Amendments themselves, but also from the power of the Courts to apply them". (Address: Canadian Bar Review, Ottawa Electric Building, Ottawa, Ontario; price for a single copy: $1.00.)

CORPORATIONS — *"Stockholders' Control by Agreement":* Section 27 of the General Corporation Law of New York provides that the business of a corporation "shall be managed by its board of directors". A "comment" in the March issue of the *Fordham Law Review* (Vol. XVII—No. 1; pages 95-106) considers the decisions of the New York Courts which have interpreted this statutory requirement in passing upon the validity of agreements between stockholders for the control of their corporations. Although the strict view taken by New York Courts toward such agreements was apparently relaxed in *Clark* v. *Dodge*, 269 N. Y. 410, the author points out that several recent decisions by the New York Court of Appeals have limited the rule of that case almost strictly to the fact situation there presented. The opinion is expressed that some contracts between stockholders for control may afford a practical solution for many problems of corporate management and that the New York rule is therefore unrealistic. (Address: Fordham Law Review, 302 Broadway, New York 7, N. Y.; price for a single copy: $1.00.)

CORPORATIONS — *"Past and Present Trends in Corporation Law: Is Florida in Step?":* Professor Floyd A. Wright, of the University of Mi-

ami School of Law, and Victor D. Baughman, a senior student at the School, were the authors of the leading article in the December, 1947, issue of the *Miami Law Quarterly* (Vol. II—No. 2; pages 69-129). Their purpose is to appraise the corporation law of Florida in relation to provisions of later statutes. The conclusion is that a comprehensive revision is needed if new business enterprises are to be induced to locate in Florida. (Address: Miami Law Quarterly, Coral Gables, Fla.; price for a single copy: 75 cents.)

LANDLORD AND TENANT—*"Particular Forms of Agricultural Tenancies in the Southeastern States":* A study of the development of the various forms of land tenancies in farms of the South appears under the above-quoted title in the April issue of the *North Carolina Law Review* (Vol. 26—No. 3; pages 274-287). The article, by Charles S. Mangum, Jr., is described as a chapter of a forthcoming book on the legal status of the Southeastern farm tenant. The author finds that reform by statute is badly needed to avoid the burdensome technicalities of farm leaseholds developed under the common law and early statutes. (Address: North Carolina Law Review, Chapel Hill, N. C.; price for a single copy: 80 cents.)

TAXATION—*Federal Income Taxes—"The Taxation of Capital Gains and Losses Under the Federal Income Tax":* Charles B. Lowndes, Professor of Law at Duke University, in an article in the April issue of the *Texas Law Review* (Vol. XXVI—No. 4; pages 440-460) presents his objections to those provisions of the Internal Revenue Code that require special treatment of what are familiarly known as "capital gains and losses". He disagrees with Dean Griswold, of Harvard Law School, that the present system is the most satisfactory solution that has yet been found, and would strip this "shrewd and cynical device" of its "bogus economic theology" and abolish it altogether. The author argues that a dollar of what is called capital gain is no less a dollar of income than is a dollar in wages and should be taxed accordingly, apart from any theories of changing price levels and the availability of risk capital. If there would be unfairness in treating such gains as ordinary income, Professor Lowndes believes the remedy lies in eliminating the fluctuations in our economic system. (Address: Texas Law Review, Austin 12, Texas; price for a single copy: $1.00.)

TAXATION—*Federal Estate Taxes—"Estate Taxes and Higher Learning of Supreme Court":* Louis Eisenstein, of the New York Bar, has written a lengthy article under the above title in the April-May issue of the *Tax Law Review* (Vol. Three—No. 3; pages 395-465). The article reviews in detail the development of the federal estate tax law under decisions of the Supreme Court. The author reflects his continuing disagreement with the rationale of the important decisions in the field. (Address: New York University School of Law, 100 Washington Square East, New York 3, N. Y.; price for a single copy not stated.)

TRUSTS AND ESTATES—*Estate Planning—"Planning for the Income of an Estate and Its Heirs":* The matter of estate planning has received increasing attention in recent years, and deservedly so. Men of affairs are slowly coming to recognize that plans for the disposition of property should receive at least as much care and thought as their plans for its accumulation. A useful addition to the literature on the subject is the article by Wilbur H. Friedman and Gerald Silbert, of the New York Bar, in the *Fordham Law Review* for March (Vol. XVII—No. 1; pages 1-37). The authors discuss methods of minimizing income taxes assessed against the estate or trust and the beneficiaries and thus increasing the income available to the beneficiaries. The article was prepared before the enactment of the Revenue Act of 1948; the authors' suggestions must be weighed in the light of the new statute, but it is believed that for the most part they will still be found valid. (Address: Fordham Law Review, 302 Broadway, New York 7 N. Y.; price for a single copy: $1.00).

Section of Labor Relations Law

John M. Niehaus, Chairman of the Section of Labor Relations Law, announces a regional meeting to be held in the auditorium of the Bar Association of the City of New York on July 27. The Taft-Hartley Act and possible amendments to the Act will be discussed.

Views of Our Readers

Any Covenant or Declaration on Human Rights Should Be Short and Simple

■ In response to the opportunity you extend in your April number (page 301):

I am glad to read "A Covenant of Free Nations: Shall They Agree on Basic Rights and Freedoms?" in the May JOURNAL (page 349). I agree with the resolutions offered by the Committee and adopted by the House of Delegates as shown on page 278 of the April JOURNAL.

The proposed International Covenant on Human Rights is too long and too detailed. If there is to be a Covenant now, it should be very short and simple. It would be better to seek a Declaration of the Rights of Persons as a part of the international law of the future than to seek a present Covenant.

For instance, when our leading lawyers question the interpretation and effect of the draft on "freedom" of information and the press, as shown on page 217 of the March JOURNAL, isn't there enough in the whole draft to keep the countries arguing for generations? And again the question of "domestic jurisdiction" as shown on page 388 of the May JOURNAL.

I do not think the quotation on page 351 is so simple. In paragraph "4", how can the governments "support measures which will help improve the quality of information and make a diversity of news and opinion available to the people" without in a way controlling the news?

The fewer words there can be used to express the desired fundamental principles, the better—something that everybody can understand and live up to without questioning the legality.

I think the government of the United States should be very slow about adopting any proposed Covenant or Declaration. And I think she will be. This is just a personal opinion.

FANNIE A. BIVANS

Decatur, Illinois

Denial of Resort to Courts To Enforce Private Covenants as to Real Property

■ The Supreme Court decision in the property covenant case was quite shocking to many of us, from a legal viewpoint, as it seems that the Court was acting more as a British Privy Council dealing with an Indian problem than as a law Court. In fact, the Government argued that an adverse decision would affect our international relations, thus proving what John W. Owens, of the Baltimore *Sun*, has said, that foreign affairs control our local policies.

There is in fact no violation of the "equal protection" clause of the federal Constitution, in that the treatment of all peoples would be the same; i.e., that all property owners could sell subject to such restrictions as would protect their mutual interests as they viewed them. The colored and other people would have as much right to make the same restrictions as the white people. They would have the same right to sell on the basis of excluding whites as *vice versa*.

Why do promoters make restrictions, such as the value of the houses, set-backs, etc.? Obviously to protect their interests and those to whom they hope to sell. These rights have become so well-fixed that I do not know of a State Court decision to the contrary, and this applies to both New York and California and every other State where anyone had the temerity to raise the question. Why do public officials, including some members of the Supreme Court, go to expensive and sometimes exclusive neighborhoods? I know of none living on U Street or vicinity, here in Washington. It is because their sensibilities are involved. Yet, they render a decision that deprives those who cannot afford to pay a price which in itself is restrictive at least in large measure of the means of protecting their sensibilities. The colored ought to be able to protect themselves from white intrusion as well as white from colored intrusion.

When that is true, it is difficult to see how the "equal protection" clause can be invoked. The use of the Courts to enforce private agreements cannot in any constitutional sense be said to be State action. Private rights alone are involved, which makes a very different case from those where ordinances or some State-originated action is involved. There is a very clear distinction between those two types of actions. The quotation by the Court of the Civil Rights statute is missapplied, as we have seen that the colored have the same rights as the whites. All that statute says, according to the quotation, is that "All citizens ... shall have the same right . . . as is enjoyed by white citizens . . ." to take and hold property. So, any way the matter is looked at, the same result ensues. The Courts are therefore treating both elements alike when they protect their agreements.

GEORGE WASHINGTON WILLIAMS

Washington, D. C.

Bar Association News

Richard B. Allen • Editor-in-Charge

Largest Local Bar Association Celebrates Its Fortieth Anniversary

▪ In 1908 a number of New York City lawyers, believing that changing conditions in the profession called for a new metropolitan organization on a broad base that drew no membership distinctions as to age, prestige at the Bar, sex, race, color or national origin, formed the New York County Lawyers' Association which with more than 7000 members has become the largest of local Bar Associations as well as one of the most progressive. On May 20 the "County Lawyers" celebrated its fortieth anniversary in its handsome Home of Law in Vesey Street facing St. Paul's Chapel, just off New York's historic City Hall Park.

Of the youthful malcontents who were original incorporators, one who in 1908 had lately arrived in New York from his native North Carolina, spoke feelingly of the officers, directors and committee members who had given generously of their time and talents since the founding. He recalled such magic names among former Association presidents as the late Alton B. Parker, William Nelson Cromwell, Joseph H. Choate, Henry W. Taft, Charles A. Boston, George Z. Medalie. Of them all—twenty-one presidents, seven secretaries, five treasurers, and the many committee members—he said: "Well done, good and faithful servants!" The speaker was the noted George Gordon Battle.

Reminiscently, the older lawyers present recalled that the organizing membership of 1500 (307 of these are still members) had been doubled in the first year. The Association had immediately to move out of the 3300 square feet of floor space which it had first occupied in the City Investing Building at 165 Broadway into larger, and then still larger, quarters in the same building. In twenty years it faced a critical "housing problem". It was solved through the generosity of William Nelson Cromwell, president in 1928, who donated funds for the erection of the present spacious building designed by Cass Gilbert, which has become a landmark of lower Manhattan. The federal Courts, then a few doors away at the south end of City Hall Park, and the *nisi prius* terms of the Supreme Court, then in a building in the rear of the City Hall, have since moved north to Foley Square, but this Home of Law is about equidistant between the Wall Street district and the trial Courts.

The Association membership of more than 7000 includes seven life members, 293 sustaining and 383 associates, the latter scattered through twenty-eight States, the District of Columbia, Cuba and Switzerland. In the first year a board of directors and seventeen committees channeled all of the Association's activities. Today the Association's activities require forty-one standing and seven special committees. The library has grown to 85,000 volumes, with an important collection of foreign publications on civil and commercial law.

On the platform at the anniversary exercises was the outgoing president, former Judge Joseph M. Proskauer, whose distinguished career in many fields was chronicled in 34 A.B.A.J. 41; January, 1948. With him was William Dean Embree, president in 1942-44, who was among the early proponents of legal referral services as a means of making competent legal services available to people of moderate means—a project which came to fruition in New York City under the presidency of Judge Proskauer. Representing the Association in the House of Delegates is Whitney North Seymour.

At the anniversary celebration, the principal speaker, Presiding Justice David W. Peck, of the Appellate Division of the State Supreme Court for the First Department, warned of a condition in the Courts and in law practice which constitutes a problem "fraught with danger, even possible disaster, to our Court system". The trial calendar of the Supreme Court in New York and Bronx counties, now lagging two years behind, seemed to him symptomatic of a "deep dislocation" in the Court body. He looks to the organized Bar for tangible aid in the redistribution of cases channeled into the overtaxed Supreme Court while available facilities of lower Courts are disregarded.

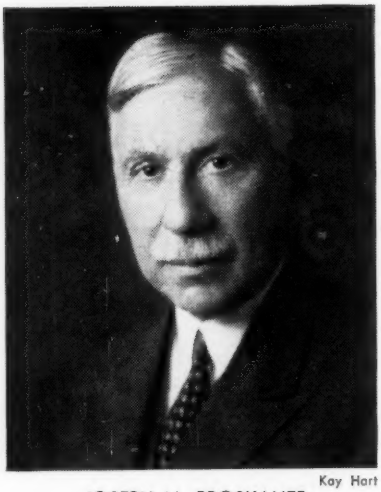
Members of our profession in other localities may be interested in some recounting of activities and experience of this pioneering democratic Bar Association. Almost from its founding, the "County Lawyers" set out to act as a clearing house of information on professional ethics. Many of the younger lawyers, however well qualified in other respects, were lacking in "background information" and legal traditions. The Association was fortunate in having the leadership of Charles A. Boston, who had labored intensively on the drafting and amendment of the Canons and who was President of the American Bar Association in 1930-31. By 1932 the County Lawyers' Committee on Professional Ethics had attained a position of national authority on perplexing questions of interpretation of the Canons of Professional Ethics. Within the past eighteen years the Committee has answered not less than 583 formally submitted questions as well as great numbers of informal inquiries.

The County Lawyers' Committee

on Unlawful Practice has been diligent in efforts to protect the public from unqualified "advisers" who attempt to render legal service. One of the important achievements of the Association lately was the Committee's initiating and winning of the *Bercu* case (see 34 A.B.A.J. 519, June, 1948). The opinion by the Appellate Division establishes that accountants cannot render legal advice, or pass upon questions of law except as an incident to their accounting work. Before the Appellate Division in this landmark of jurisprudence, County Lawyers' was joined by the New York State Bar Association and the Association of the Bar of the City of New York. The latter was represented by Ray Williams and the State Bar by Julius Henry Cohen, himself a former chairman of the County Lawyers' committee. He and his successor, the present Chairman Edwin M. Otterbourg, the later of whom made the presentation of the *Bercu* case, have received nation-wide recognition as authorities on unauthorized practice of law.

The Committee on Legislation examines and reports to the legislature and Governor on every bill introduced at each session of the State legislature. It exposes many defects and dangers in proposed legislation, and at times plays an influential part in defeating bad bills or advancing good ones.

Another development of Judge Proskauer's administration was the creation of a Colloquium on Juvenile Delinquency, which led to the appointment of a special Committee on Socio-Legal Jurisprudence which is looked on as offering prospects of an advance by the Association into the fields of sociology. The Colloquium held on March 20 was attended by more than 300 representatives of New York welfare organizations and others concerned with the problems of juvenile delinquency. It was designed "to extend the scope of the Association's activities to a broad field of public interest where undeveloped opportunities exist for lawyers to be of public service".



Kay Hart

JOSEPH M. PROSKAUER
Retiring President, New York County Lawyers' Association

HOWARD LEHMAN
President, New York County Lawyers' Association

The new Committee, described by the Association as "a horizontal voyage of discovery into legislation and laws which harmonize with modern psychology and psychiatry", is under way. I. Howard Lehman, the incoming president, has been a deep student and active leader in the fields which will be explored.

Having spent his whole career at the Bar (forty-four years) in the firm now known as Lehman, Goldmark and Rohrlick, of which he is now senior partner and Alfred A. Cook is counsel, Mr. Lehman has long been recognized as an expert and authority in the law of corporate finance, reorganizations, and railroad and industrial affairs. He has been a member of the American Bar Association since 1915, is on the board of governors of the Lawyers' Club, and is a member of the New York State Bar Association and the Association of the Bar of the City of New York. For some years he has been a vice president of the County Lawyers' Association and served on its Committee on the Judiciary. During the war emergency he was Chairman of the Finance Committee which coped with the severe conditions caused by the remittal of dues for members in the armed forces.

Along with his activities as a corporate director and busy lawyer from the time of his admission to the Bar in 1904 from the New York Law School, he has devoted much time to efforts for the improvement of social and economic conditions, and many community and philanthropic affairs have claimed him. These include the Federation of Jewish Philanthropies of New York, of which he is a trustee; the well-known Children's Center of Greater New York, of which he is a founder and former director and vice president; and the Jewish Child Care Association (organized when Thomas Jefferson was still alive), of which he was president for six years and is now chairman of the board.

Now with the New York County Lawyers' Association and its large membership intent on probing the possibilities for lawyers to serve professionally in the fields of sociological betterment and reform which have already commanded Mr. Lehman's interest and energies, he is regarded as that Association's most suitable leader for the next two years.

Trends Toward Further Centralization of Federal Powers Are Opposed

■ In a speech before the Hinds County Bar Association in Jackson, Mississippi, on May 13, Frank E. Holman, of Seattle, unopposed nominee for the presidency of our Association for 1948-49, criticized the trend toward centralization of governmental power and urged resistance to further efforts to strengthen executive power.

Speaking on "Our American Heritage", Mr. Holman declared that the intent of the founding fathers was to establish a national government of limited powers which would leave to the States jurisdiction over local matters, both social and economic. "I feel very strongly—and have for years that we have been drifting towards a centralized autocracy and building up in Washington a sort of Frankenstein government of monstrous proportions", the Jackson *Daily News* quoted Mr. Holmar as saying.

Failure to preserve the independence of federal Courts was cited by the speaker as a dangerous step toward centralization. In this connection he mentioned the 1937 Supreme Court "packing" plan, and went on to say that when the legislation failed of enactment, it was followed by a practice of appointing to the Court men favorably disposed in their social, economic and legal views to the policies of the administration in power at the time.

"It is to the good of the citizenry", warned Mr. Holman, "to advise itself of the situation and understand it, and at least resist further efforts along the line of strengthening the executive power".

Mr. Holman was introduced to the gathering of 175 by Hubert Lipscomb, Jackson attorney, State Delegate from Mississippi. Ross Barnett, President of the Hinds County Bar Association, was in the chair. Stokes V. Robertson, of Jackson, at that time President of the Mississippi State Bar, also spoke.

New Jersey Bar Association Holds 50th Annual Meeting

■ At the fiftieth annual meeting of the New Jersey State Bar Association, held in Atlantic City on May 14 and 15, much of the business was in preparation for the State's reorganized judiciary under its new State Constitution effective in this respect on September 15. A feature was a symposium on the proposed new Court rules and legislation to implement the judiciary article of the Constitution. This was under the direction of a special committee headed by George W. C. McCarter of Newark, who presided at the meeting. The Chief Justice-Designate, Arthur T. Vanderbilt, of Newark, former President of the American Bar Association, discussed several proposals under consideration by the members of the Court in their work on the final rules. The new rules and legislation, when adopted, will be the product of intensive study and discussion by the Bar of the State; individual lawyers and local, county and State Bar Associations, as well as the public, have contributed much to the process (see our June issue, page 445).

Study and consideration of a new proposed Administrative Procedure Act for the State of New Jersey have been going forward under the guidance of a Special Committee of which Sylvester C. Smith, Jr., of Newark, a member of the House of Delegates and the former Chairman of our Association's Section on Administrative Law. He reported that it is hoped that through public hearings and efforts on the part of many groups, a satisfactory statute for New Jersey can be perfected. The Committee submitted several proposals which were approved by the State Association, and the Committee is continuing its active work on this legislation.

The integration of the Bar of the State continued to be under active consideration in the Association during the year. A special committee of which Walter G. Winne, of Hackensack, was Chairman, reported that an exposition of this proposal has been presented to every county Bar Association in the State. A resolution authorizing the incoming President to appoint a committee for further study and to make recommendations was adopted. Integration of the State Bar has been before the Association at intervals for several years past, and an effort is being made to explain thoroughly its advantages and disadvantages before another definite step to present the matter to the State Supreme Court is taken.

New officers for the ensuing year were elected: President, N. Louis Paladeau, Jr., of Jersey City; First Vice President, Robert K. Bell, of Ocean City; Second Vice President, John H. Yauch, Jr., of Newark; Third Vice President, Philip R. Gebhardt, of Clinton; Secretary, Emma E. Dillon, of Trenton; Treasurer, Edward T. Curry, of Camden. Three directors for a term of three years were also elected: First Judicial District, Douglas V. Aitken, of Bridgeton; Second Judicial District, Robert J. Tait Paul, of Camden; Third Judicial District, Theodore D. Parsons, of Red Bank. Because Philip R. Gebhardt of Clinton was elected an officer, he resigned as a director from the Fourth Judicial District, and Robert B. Meyner, of Phillipsburg, was elected to fill the unexpired term.

N. LOUIS PALADEAU, JR.
President, New Jersey State Bar Association

The guests of honor at the meeting were Edwin E. C. Bleakley, of Camden, the only living incorporator of the New Jersey State Bar Association, and Charles C. Babcock, of Atlantic City; Jacob W. DeYoe, of Paterson; Vivian M. Lewis of Paterson; Frank T. Lloyd, of Camden; Harry V. Osborne, of Newark; John F. Reger, of Somerville; and Samuel H. Richards, of Camden, all of whom became members of the Association during its first year. In addition to these gentlemen, the following who have been members of the Association continuously for forty years or more, were all special guests at a

dinner for them and also at the fiftieth dinner of the Association: G. Arthur Bolte, of Atlantic City; William T. Boyle of Camden; Clarence E. Case, of Somerville; Harry R. Coulomb, of Atlantic City; Ralph W. E. Donges, of Camden; James H. Hayes, Jr., of Newark; William C. Jones, of Philadelphia; Charles A. Landis, Jr., of Sea Isle City; Adrian Lyon, of Perth Amboy; Charles S. Moore, of Atlantic City; William T. Read, of Camden; Henry F. Stockwell, of Camden; and Marshall Van Winkle of Jersey City.

The President of the Association, Joseph J. Summerill, Jr., of Camden, who was in the chair at all of the business sessions, presided also at the dinner. Governor Alfred E. Driscoll of the State, gave an address on "Implementing Our New Constitution". Himself a member of the State Bar Association, he outlined many of the difficulties which are encountered in the complete reorganization of the State government under the new Constitution, and appealed to the members to continue their assistance in this project.

Judge Harold B. Wells, of the Court of Errors and Appeals, expressed the appreciation of the members of the Association to the special guests of honor for their foresight, hard work, and long and continuous support of the Association's work.

One of the interesting features of the annual meeting was the address of President Summerill, who gave a thumbnail sketch of the history of the Association during its first thirty years and coupled with it many news items published early in the period, most of which were amusing in the light of current events in the State. He was particularly careful to include quotations from leaders of the earlier days with regard to then current legislation and other public matters. His paper is a valuable addition to the history of the Bar of the State and the activities of the Association.

The Gold Medal of Honor of the Association was most appropriately bestowed on Judge A. Dayton Oliphant, Chancellor of the State of New Jersey, and to Judge Clarence E. Case, Chief Justice of the State of New Jersey, under the Constitution hitherto in effect. They will continue as members of the reorganized Court. This rare award is made only to members of the Association who have rendered outstanding service to the Bar and to the public.

The General Council of the Association elected the following as its Delegates to the House of Delegates: Allen B. Endicott, Jr., of Atlantic City; Sylvester C. Smith, Jr., of Newark; and Frank T. Lloyd, Jr., of Camden.

Associations Seek Standardized Qualifications for Judgeships

■ The often-troublesome problems which arise when there are two or more Bar Associations in a judicial district in which judges are to be nominated and the Bar Associations undertake action as to the qualifications of candidates and such action is used in campaign posters and political speeches, led the Committee on the Judiciary in the Association of the Bar of the City of New York to report to that Association on May 11:

> We have considered the policy and procedure of the Committee and the Association respecting the description and endorsement of candidates; and we are hopeful that in connection with reports on candidates to be elected next fall and thereafter we shall be able to apply standards and terminology which will enable the Committee, the Association, and the public to discriminate among candidates with reasonable precision and clarity.
>
> To that end the Committee worked out with the President and Executive Committee, and the Executive Committee of the Association, the following resolution for a standardized nomenclature:
>
> WHEREAS it is important that the policy and procedure of the Committee on the Judiciary and of the Association may be understood by the membership and the public; and
>
> WHEREAS the New York County Lawyers' Association has recently adopted a by-law amendment under which its board of directors is required to classify candidates for judicial office as exceptionally well qualified (to be used only in the case of a judge completing with distinction a full elected term), well qualified, qualified, or not qualified, as the case may be; and
>
> WHEREAS it is desirable that so far as possible statements concerning candidates for election made by this Association and by the New York County Lawyers' Association use the same words to describe the qualifications of candidates and that the meaning of those words be known to the public; it is
>
> RESOLVED that in stating the qualifications of a candidate for election the Committee, in the resolution submitted to the Association, and the Association, in the resolution adopted at a meeting, will designate him as not qualified, qualified, or well qualified for the office for which he is a candidate, such words being defined as follows:
>
> "Not qualified" means that the candidate does not possess the character and reputation, ability, experience, and legal education necessary for satisfactory discharge of the duties of the office.
>
> "Qualified" means that the candidate possesses the character and reputation, ability, experience and legal education for satisfactory discharge of the duties of the office.
>
> "Well qualified" means that the candidate possesses the character and reputation, ability, experience and legal education for distinguished discharge of the duties of the office.
>
> FURTHER RESOLVED that when the public interest justifies the Committee will submit a further resolution to a meeting of the Association recommending that the Association urge, and take measures to secure, the election or defeat of a particular candidate.

To meet other complications which have arisen at times, the Committee reported to the Association:

> It is appropriate to add that we believe that in the future members of the Committee should not be attached to candidates' campaign committees and should not speak from the floor on amendments to resolutions not recommended or accepted by the Committee except in support of a minority report to which they have subscribed.

Concerning the use of polls, "primaries", or expressions of preference, among members of the Association as to candidates or prospective nominees for elective judicial office, the Committee had reported to the Asso-

ciation in May, 1947:

> We realize that expression of a preference . . . might have been helpful to some members of the Association and to independent voters at the [1946] election. The qualifications of the candidates made such an expression impractical last year. In some cities polls and questionnaires are used to determine the choice of the Bar. We are making a study of such methods for future report to the Association. Under the present system, however, emphasis must be placed on the selection of qualified candidates by the political leaders; when qualified candidates have been selected, the expression of a preference among them based upon vote of the Committee would probably not be helpful in the circumstances present last year and might be resented by many.

At the Association's 1948 annual meeting on May 11, the Committee reported further on the above subject as follows:

> A word about bar polls and primaries: In line with the statement made in our May, 1947, report, a study of the methods used in Cleveland, Chicago, and elsewhere to determine the choice of the bar has been completed and has been under consideration for some time. While we are not prepared to take a stand against the use of such methods in all circumstances, we are not convinced that polls or primaries would be useful in the First Judicial District; and, indeed, we are inclined to believe that the careful investigations of this Committee, combined with Association consideration and action, are better calculated to bring about the nomination and election of qualified judges than methods used elsewhere. We shall continue to consider the use to which polls and primaries might usefully be put and shall not hesitate to recommend departure from the practice of the Committee in appropriate circumstances.

Cuyahoga County Bar Association Elects Officers

■ Franklin A. Polk has been elected President of each the Cuyahoga County Bar Association (Cleveland) and the Cleveland-Marshall Law School Alumni Association. In the former Association he succeeds Raymond D. Metzner and in the latter John H. Orgill.

Other newly-elected officers of the Cuyahoga County Bar Association are John H. Price, First Vice President; Wiliam A. Weiss, Second Vice President; and H. Franklin Hamilton, Third Vice President.

In the Cleveland-Marshall Law School Alumni Association, the other officers are William R. Pringle, First Vice President; Joseph Taddeo, Second Vice President; Albert D. Nesbitt, Secretary; and Margaret A. Mahoney, Treasurer.

Essex County Bar Celebrates Its Fiftieth Anniversary

■ Chief Justice-Designate Arthur T. Vanderbilt and the six jurists who will be Associate Justices of the Supreme Court of New Jersey in formation under the Constitution of 1947 were honor guests of the Essex County Bar Association (New Jersey) on May 22, when the Association celebrated its fiftieth anniversary with a dinner at the Hotel Astor in New York City.

The attractive program brochure for the event was featured by a short history of the Association, written by Jacob L. Newman, of the Newark Bar, who recounted that the Bar of Essex County has furnished two Presidents of the American Bar Association—Cortlandt Parker, who served in 1883-84, and Chief Justice Vanderbilt, who was President of our Association in 1937-38.

Mr. Newman wrote also that the Essex County Bar played a unique role in the adoption of each the State Constitutions of 1844 and 1947. A native son of Essex County, Joseph C. Hornblower, was the last Chief Justice to serve under the Constitution before that of 1844, and as a member of the constitutional convention of that year, he played a principal role in insisting upon the introduction of the Bill of Rights in the Constitution then adopted. Latterly, Chief Justice Vanderbilt was always in the front rank of those who advocated and accomplished inclusion on an adequate Judiciary Article in the Constitution of 1947 to meet modern needs as to State Courts and their procedure (34 A.B.A.J. 11; January, 1948).

Iowa State Bar Conducts 300th Weekly "Roundtable" Broadcast

■ The "Iowa Roundtable", outstanding public service radio broadcast of the Iowa State Bar Association, completed its 300th regular weekly broadcast over WHO, Des Moines, on May 22. The presentation, produced and directed by that Association, is heard at 3 o'clock on Saturday afternoons.

The program was conceived "to stimulate in the people of our nation a proper appreciation of democratic principles and of the privileges and duties of an American citizen". The topics discussed, many times vigorously and always incisively, have covered a wide range of problems and subjects, from Iowa to the entire world. Wendell B. Gibson, of Des Moines, and Paul DeWitt, then Secretary of the Iowa State Bar Association and now Executive Secretary of the Association of the Bar of the City of New York, devised the original "Iowa Roundtable" presentation as a part of the program of the Junior Bar Section of the State Association. The program was inaugurated on April 13, 1941, when the subject discussed was: "Should the British Government Formulate a Plan for the Future So Its People May Have a Definite War Objective?" The wide range of discussion which has taken place is highlighted by the fact that the May 15 broadcast of this year discussed "World Understanding—A Community Job".

Legal topics have been discussed only three or four times and then in informative programs dealing with the federal income tax. The topics have been those upon which there were valid differences of opinion, and the programs have been produced with the avowed purpose of stimulating thinking by the listeners. The primary objective of the program is to have lay expression of ideas and to maintain spontaneity. For this reason "experts" have been used sparingly in favor of articulate lay persons.

A random glance at the log of programs during the seven years of the

Roundtable reveals that the range of topics has indeed been wide. International relations have furnished frequently the provocative questions; e.g., "Peace Implications", "The San Francisco Conference", and "Trusteeship Under the United Nations". Purely domestic issues have been debated; e.g., "The Republican and Democratic Platforms", "Industrial Profit Sharing", and "Tax Reduction: Now or Later". The explosive field of labor relations has not been ignored; e.g., "The Taft-Hartley Act" and "Is There a Right To Strike?". A wide variety of other fields have been covered, such as "Religion in Public Education", "Children's Radio Programs", "Music in Our Time", and "Are the American People Gullible?"

Hiram Hunn, of Des Moines, has been director of the Roundtable since 1942. When war service claimed most of the Junior Bar, the State Bar Association itself assumed directorship of the program; Mr. Hunn succeeded Mr. Gibson, whose foresight and careful direction in the early days set the standard of production. Mr. Hunn acts frequently as moderator on the program.

The Roundtable boasts an unusually high Hooper rating. WHO is a 50,000-watt clear-channel station, owned and operated by the Central Broadcasting Company, which makes the thirty-minute period available to the Association on a sustaining basis. In his 1947 report to the Association, Mr. Hunn stated that the Roundtable had a rating of 37.2 per cent of the total audience within a broadcast range of WHO. The nearest competitive program for the broadcast period was listed at 27.7 per cent. The Roundtable has a rating 11.2 per cent higher than that of the preceding hour (2 o'clock to 3 o'clock) on the same station. Since January 4, 1947, the Roundtable has been carried on the Corn Belt Wireless Network in Iowa.

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Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Joseph S. Platt, Committee Chairman.

Alimony and the Income Tax

■ The Revenue Act of 1948 has not put an end to divorce, and lawyers will still find it necessary to refer from time to time to the provisions of the Internal Revenue Code prescribing the tax consequences which flow from the payment and receipt of alimony.

It is usually to the interest of both parties to have the income tax shifted to the wife. This is obvious from the husband's point of view, and the wife can ordinarily get a better settlement (at the expense of the tax collector) if she is prepared to take the alimony payments into her low bracket return. The shifting of the tax burden is accomplished under Sections 22(k) and 23(u). The provisions of these statutes must be meticulously observed. To qualify for the tax shift the payments must be "periodic"; they must be received subsequent to the divorce decree; and they must be paid in discharge of a legal obligation (i.e., for support) imposed on the husband by the decree or by a written instrument incident to the divorce. If the conditions are met the alimony payments are taxable to the wife under Section 22(k) and deductible by the husband under Section 23(u).

These statutes do not apply to amounts specifically allocated to the support of minor children. Nor do they apply to "installment payments" in discharge of "an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument", (unless the installments are spread over more than ten years, in which case not to exceed ten per cent of the principal sum each year will be treated as "periodic" payments).

These statutes were enacted in 1942 and court decisions construing and applying them are just beginning to come through in substantial numbers.

The Tax Court recently had occasion to construe the above clause relative to "installment payments". In the case of *John H. Lee*, 10 T. C., No. 111, the husband was required for a period of five years to pay his wife an annual amount equal to one-third of his net income up to $12,000 and one-fourth of all over $12,000. The Commissioner argued that in view of the five-year limitation and the definite formula these were installment payments in discharge of a lump sum obligation and so not taxable to the wife nor deductible by the husband. The Court held otherwise. The total amount to be paid was wholly uncertain; no principal sum "in terms of money" was specified in the decree.

A closer case—and one more difficult to justify—is *Roland Keith Young*, 10 T. C., No. 96. There the husband's maximum obligation was limited to $1000 per month for fifty months, or a total of $50,000. This

obligation was subject, however, to reduction under a formula following each year in which the husband's net income dropped under $50,000. Again the Tax Court allowed the husband to deduct the amounts paid. Apparently, if the amount to be paid is uncertain under the decree, although subject to a maximum dollar limitation, the payments will be treated as "periodic" and taxable to the wife. Compare, however, *J. B. Steinel,* 10 T. C., No. 52, where the husband's lump sum obligation was conditional in certain respects and the installment payments were to cease upon the wife's re-marriage, etc. The Tax Court upheld the Commissioner and disallowed the husband's deduction.

A different aspect of the alimony problem was involved in *Peter Van-Vlaanderen,* 10 T. C., No. 93. The statute requires that the obligation discharged by the husband's payments must be imposed upon him "under such decree". The taxpayer in this case had generously paid his wife for many years the sum of $100 per month in lieu of the niggardly $30 required by the divorce decree. Faced with an income tax deficiency based upon the disallowance of the excess payments, the husband had obtained a court order, effective *nunc pro tunc* as of a date prior to the taxable years, increasing his monthly obligation to the $100 actually paid. The Tax Court upheld the Commissioner. The husband's payments can only be deductible to the extent that they are required by an existing court order—*nunc pro tunc* will not do. The fact that the wife in this case had reported the full $100 in her return was considered immaterial by the Court.

Another issue recently decided is the deductibility of alimony payments by the deceased husband's estate. This involves, in addition to the statutes mentioned above, the provisions of the Code relative to estates and trusts. In *Estate of Homer Laughlin* v. *Commissioner,* (Prentice-Hall, par. 72,473) the Ninth Circuit upheld the deduction. The Commissioner had contended that with the death of the husband his support obligation ceased and the subsequent payments to the divorced wife were in discharge of an ordinary debt of the estate. In reversing the Tax Court (which had upheld the Commissioner) the Circuit Court relied upon Section 171 (b) which provides that in computing the net income of an estate a wife receiving payments taxable to her under Section 22 (k) shall be considered as a beneficiary, and Section 162 (b) which authorizes an estate to deduct income currently distributable to the beneficiaries.

Tax-wise, it is usually better to be married than divorced, at least for the spouse having the larger income and estate. However, the relation of husband and wife is frequently complicated by non-tax considerations, and there will always be some taxpayers or their spouses who insist upon terminating the marital status. In such event, a careful reading of these alimony statutes as construed by the courts may enable the taxpayer's lawyer to shape the transaction so as to retain some of the benefits of the split income rule, and thereby to temper the wind to the shorn lamb.

OUR YOUNGER LAWYERS

Charles H. Burton, Secretary and Editor-in-Charge, Washington, D. C.

"On to Seattle"

■ "On to Seattle" is the most current slogan among the Junior Bar Conference members. Reference is made thereby to the 1948 Annual Meeting of the Conference, in Seattle, to begin on Saturday morning, September 4, and extending through Tuesday, September 7, with our Association's meeting continuing through Thursday. Principal reason for the great interest is the activity of the newly-created Annual Meeting Committee, headed by William R. Eddleman, of Seattle, last year's National Secretary of the Conference. Vice Chairman of the Committee is Bryce Rae, Jr., of Washington, D. C., with Cameron E. Cecil, of Los Angeles, as Council Adviser.

The program for the Seattle sessions is announced by Conference Chairman T. Julian Skinner, Jr., of Jasper, Alabama, and will be found on page 624.

Varied Social Program Is Being Planned

In addition to the official social events listed above, Bill Eddleman reports that reservations have been made for JBC members on Saturday evening, September 4, on the dinner

WILLIAM R. EDDLEMAN
Annual Meeting Committee Chairman

club cruiser *Silver Swan,* which operates on Lake Washington.

To all JBC members attending the meeting, there will be offered as guests of the Washington State and Seattle Bars, a choice of two trips on Friday, September 10. One will be a trip to Mount Rainier, where at Paradise Lodge snow will be found. A number of glaciers may be viewed along the beautiful scenic route. The second will be a trip across Puget Sound to Victoria, located on Vancouver Island in Canada.

The efficient Steering Committee of the Washington State and Seattle Bars has arranged also for a luncheon at the Boeing Airplane Company, a boat trip from Lake Washington through government lakes to Puget Sound, a tour of the city of Seattle, and visits to Bremerton Navy Yard and local plywood mills. Bill Eddleman is even offering to set up a baby-sitting bureau! Small wonder, then, that the JBC by-word has become "On to Seattle".

Notice to Members of Junior Bar Conference

■ Notice is hereby given that at the annual meeting of the Junior Bar Conference to be held in Seattle, Washington, September 5, 6, 7, 1948, there will be elected a Chairman, Vice Chairman, and Secretary, each for a term of one year, a member of the Executive Council from each of the Second, Fourth, Sixth, Eighth and Tenth Federal Judicial Circuits, each for a term of two years.

Pursuant to Section 4 (B) of Article IV of the By-Laws, notice is hereby given that the members of the Junior Bar Conference residing in the above named Judicial Circuits (hereinafter referred to as Council Districts) may nominate candidates for the office of member of the Council from their respective districts by written petition, in each case, specifying the name of the person nominated and the office for which nominated, containing the names of at least twenty endorsers, all of whom are residents of the district of the person nominated. The petition shall state briefly a biographical sketch of the background and qualifications of the candidate. It shall be submitted to the chairman, T. Julian Skinner, Jr., Bankhead-Long Building, Jasper, Alabama, not later than August 20, 1948. At the first session of the annual meeting the Chairman of the Conference shall deliver to the chairman of the Nominating Committee all petitions submitted pursuant to this notice.

The Nominating Committee shall consider the candidates proposed by each of said petitions, as well as receive names of other candidates and report its Council nominees at the same time and place, and in the same manner that it reports the nominations for the officers of the Conference. Other nominations for the Council may be made from the floor following the report of the Nominating Committee, as may other nominations also be made for officers. The election of the Council members shall take place at the same time and place, and in the same manner as the election of officers, immediately following the conclusion of the second general session of the annual meeting, and shall be by written ballot.

TERM OF OFFICE: The term of office of the officers shall begin with the adjournment of the said annual meeting and end with the adjournment of the annual meeting to be held in 1949, or until their successors shall be elected and qualify, and the term of office of the Council members from the Second, Fourth, Sixth, Eighth and Tenth Federal Judicial Circuits shall begin with the adjournment of the 1948 annual meeting and end with the adjournment of the annual meeting to be held in 1950 or until their successors shall be elected and qualify.

ELIGIBILITY: No person shall be elected as an officer, or member of the Council if he will, during his term of office, become ineligible for membership in the Conference. The membership of a member of the Conference shall terminate at the conclusion of the annual meeting in the calendar year within which the member attains the age of thirty-six years, or upon his ceasing, prior to that time, to be a member of the American Bar Association. A person elected as a member of the Council shall be, at the time of his nomination, a resident of the Council District for which he is chosen. No person shall be eligible for election as a member of the Executive Council if he is then a member of the Council and has been such a member for a period of three consecutive years or more.

CHARLES H. BURTON,
Secretary,
Junior Bar Conference,
American Bar Association

1948 Annual Meeting:

Announcement of Section Programs for Seattle

■ Last month (34 A.B.A.J. 471; June, 1948) we published the main outlines of the Assembly and House of Delegates program for the annual meeting to be held in Seattle, Washington, September 6-9. On the following pages will be found detailed information regarding the schedule of Section meetings which will cover many stimulating and useful topics. Next month we will publish a detailed schedule of the Assembly and House of Delegates programs and information concerning the meetings of the affiliated organizations.

ADMINISTRATIVE LAW

Monday, September 6, 2:00 P.M.
(United States Court House)

General Session

Tuesday, September 7, 10:00 A.M. and 2:00 P.M.

General Session

BAR ACTIVITIES

Sunday, September 5, 12:30 P.M.
(Olympic Hotel)

Luncheon

Conference of Bar Secretaries

2:30 P.M.

Annual Conference of Bar Secretaries

Monday, September 6, 12:30 P.M.
(Olympic Hotel)

Joint Luncheon with Section of Legal Education and Admissions to the Bar, and the Committee on Continuing Legal Education

Tuesday, September 7, 10:00 A.M.
(Hungerford Hotel)

General Session

CORPORATION, BANKING AND MERCANTILE LAW

Sunday, September 5, 10:00 A.M.
(Benjamin Franklin Hotel)

Council Meeting

2:00 P.M.

Council Meeting

5:00 P.M.
(Rainier Club)

Reception for Association Officers, Governors and State Delegates

Monday, September 6, 2:00 P.M.
(Benjamin Franklin Hotel)

General Session
(Benjamin Wham, presiding)

Address of welcome, Harry P. Cain, United States Senator from Washington

Report of Section Officers and Administration Committees:

Benjamin Wham, Section Chairman
John W. Kearns, Vice Chairman and Chairman Liaison Committee
William B. Cudlip, Secretary
John Shaw Field, Chairman, Membership Committee
Edward W. Allen, Chairman, Annual Meeting Committee

Debate concerning the O'Hara Bill (H.R. 3871), which would deprive the Federal Trade Commission of its power to hear and decide cases and place such functions in the District Court

For the Bill: Daphne Robert, Atlanta, Georgia
Against the Bill: Wendell Berge, Washington, D.C.

Recent developments in the Law of Corporations, Ray Garrett, Chicago, Illinois

Resolution disapproving H.R. 5834 providing for national recordation of the assignment of the accounts receivable, Milton B. Kupfer, New York, New York

Resolution approving H.R. 2451, to make permanent Chapter 75 of the Bankruptcy Act for the relief of farmer debtors, Walter Chandler, Memphis, Tennessee

Reports of Division and Committee Chairmen (see list, opposite column)

Tuesday, September 7, 10:00 A.M.
(Benjamin Franklin Hotel)

General Session

Panel discussion concerning the Multiple Basing Point decisions of the Supreme Court of the United States, (speakers to be announced)

Recent developments in foreign trade: International Trade Organization, Reciprocal Trade Agreements, etc. (speakers to be announced)

Panel discussion concerning branch banking (speakers to be announced)

The Railroad Readjustment Act of 1948 (speakers to be announced)

Resolution disapproving H.R. 6012 which provided that a plan or reorganization of a railroad shall not affect State regulations relating to service, operations or rates (speakers to be announced)

Resolution approving H.R. 5693 (with the exception of Section 13) embodying clarifying and non-controversial amendments to the Bankruptcy Act, Frank C. Olive, Indianapolis, Indiana

Reports of Division and Committee Chairmen (see list, opposite column)

12:30 P.M.
(Chamber of Commerce Building)

Joint Luncheon with the Section of Taxation

Discussion of tax discrimination against sole proprietors, partners and others (speakers to be announced)

2:30 P.M.
(Benjamin Franklin Hotel)

General Session

Resolution to amend the Internal Revenue Code for the purpose of removing tax discriminations against sole proprietors, partners and others similarly situated, John R. Nicholson, Chicago, Illinois

The proposed Uniform State Securities Act, Lawrence Bennett, New York, New York, and Jess Halsted, Chicago, Illinois

Division and Committee Chairmen Reports (see list opposite column)

Report of Nominating Committee—installation of officers

Wednesday, September 8, 7:00 P.M.
(Benjamin Franklin Hotel)

Joint Dinner with Section of International and Comparative Law

Speakers: Bourke B. Hickenlooper, United States Senator from Iowa
Harry P. Cain, United States Senator from Washington
Hernando de Lavelle, Lima, Peru, last past president, Inter-American Bar Association

Reports of Division and Committee Chairmen

(These reports will be given Monday afternoon, Tuesday morning and Tuesday afternoon at the end of the special events listed above and as time permits)

Division of Corporations, Jay P. Taggart, Chairman, Cleveland, Ohio

Division of Banking, William B. Cudlip, Chairman, Detroit, Michigan

Division of Finance and Securities, Lawrence Bennett, Chairman, New York

Division of Reorganizations and Bankruptcy, Walter Chandler, Chairman, Memphis, Tennessee

Division of Trade and Commerce, Harold J. Gallagher, Chairman, New York

Division of Mercantile Law, J. Francis Ireton, Chairman, Baltimore, Maryland

Division of Cooperative Corporations, Karl D. Loos, Chairman, Washington, D. C.

Division of Non-Corporate Forms of Business organizations, John R. Nicholson, Chicago, Illinois

CRIMINAL LAW

Tuesday, September 7, 2:00 P.M.
and Wednesday, September 8, 10:00 A.M.
(United States Court House)

General Session

INTERNATIONAL AND COMPARATIVE LAW

Sunday, September 5, 2:00 P.M.
(Olympic Hotel)

Meeting of Council

Monday, September 6, 2:00 P.M.
(United States Court House)

General Session

Tuesday, September 7, 10:00 A.M.
(United States Court House)

General Session

12:30 P.M.
(Olympic Hotel)

Joint Luncheon with Junior Bar Conference

War Crimes Trials:
Speakers:
Charles F. Wennerstrum, Chariton, Iowa, presiding judge, Tribunal V, Nuremberg
H. A. Hauxhurst, Cleveland, Ohio, assistant prose-

cutor at Tokyo

Owen Cunningham, Des Moines, Iowa, defense counsel for Oshima at Tokyo

2:30 P.M.
(Olympic Hotel)

Forum on Far-Eastern Law

7:00 P.M.
(Benjamin Franklin Hotel)

Joint Dinner with Section of Corporation, Banking and Mercantile Law

INSURANCE LAW

Sunday, September 5, 12:00 P.M.
(New Washington Hotel)

Luncheon Meeting for Officers, Members of Council and Committee Chairmen

Monday, September 6, 2:00 P.M.
(New Washington Hotel)

General Session

Thomas Watters, Jr., Chairman, presiding

Address of welcome, by William A. Sullivan, Commissioner of Insurance, State of Washington

Response by J. Harry LaBrum, last retiring Chairman, Philadelphia, Pennsylvania

Address by Stanley W. Taylor, Superintendent of Insurance, Province of British Columbia, Canada

Administrative Reports:

Secretary: Ralph H. Kastner, Chicago, Illinois

Membership: Grover Middlebrooks, Chairman, Atlanta, Georgia

Publications: Harry W. Raymond, Chairman, New York, New York

Appointment of Nominating Committee

Address: "Federal Tort Claims Act", by Joseph W. Henderson, Philadelphia, Pennsylvania

Reports of General Committees:

Automobile Insurance Law: F. B. Baylor, Chairman, Lincoln, Nebraska

Aviation Insurance Law: Stanley C. Morris, Chairman, Charleston, West Virginia

Casualty Insurance Law: H. Beale Rollins, Chairman, Baltimore, Maryland

Cooperation with State and Local Bar Associations: H. E. Hilton, Chairman, Washington, D. C.

Fidelity and Surety Insurance Law: Walter A. Mansfield, Chairman, Detroit, Michigan

Fire Insurance Law: Homer H. Berger, Chairman, Kansas City, Missouri

Health and Accident Insurance Law: F. Roland Allaben, Chairman, Grand Rapids, Michigan

Insurance Status: John V. Bloys, Chairman, New York, New York

Insurance Law Practice and Procedure: Forrest A. Betts, Chairman, Los Angeles, California

Life Insurance Law: Tom Leeming, Chairman, Chicago, Illinois

Marine and Inland Marine Insurance Law: George E. Beechwood, Chairman, Philadelphia, Pennsylvania

Regulation of Insurance Companies: Cecil C. Fraizer, Chairman, Lincoln, Nebraska

Veteran's Affairs: Harry W. Colmery, Chairman, Topeka, Kansas

Workmen's Compensation and Employers' Liability Insurance Law: Welcome D. Pierson, Chairman, Oklahoma City, Oklahoma

(Those committee reports not reached at the time of adjournment will be in order at the Wednesday morning session)

Tuesday, September 7, 8:00 A.M.
(New Washington Hotel)

Breakfast

Committee on Health and Accident Insurance Law and Committee on Life Insurance Law

10:00 A.M.

ROUND TABLE I.

Health and Accident Insurance Law, F. Roland Allaben, Chairman

Compulsory Non-Occupational Disability Benefits, Leslie P. Hemry, Boston, Massachusetts

Life Insurance Law, Tom Leeming, Chairman

Life Insurance Tax problems under the Revenue Act of 1948, Eugene M. Thore, New York, New York

ROUND TABLE II.

Fidelity and Surety Insurance Law, Walter A. Mansfield, Chairman

Rights of Materialman and Surety in Contract Funds, W. Braxton Dew, Hartford, Connecticut

Present and Future Trends and Problems in the Fidelity and Surety Field, W. R. McKelvy, Seattle, Washington

ROUND TABLE III.

Automobile Insurance Law, F. B. Baylor, Chairman

2:00 P.M.

ROUND TABLE IV.

Aviation Insurance Law, Stanley C. Morris, Chairman

A Review of Aviation Negligence Litigation to Date, Payne Karr, Seattle, Washington

Aircraft of the Future, Welwood Beal, Seattle, Washington

Proposed Uniform State Aviation Tort Liability, George W. Orr, New York, New York

ROUND TABLE V.

Casualty Insurance Law, H. Beale Rollins, Chairman

Validity of Contracts Against Consequences of Negligence, Gordon H. Sweeny, Seattle, Washington

Trends in Current Verdicts and Explanation Thereof, Charles Tighe, Chicago, Illinois

Workmen's Compensation and Employers' Liability Insurance Law, Welcome D. Pierson, Chairman

New Occupational Disease Problem, Franklin D. Marryott, Boston, Massachusetts, and Ashley St. Clair, Boston, Massachusetts

ROUND TABLE VI.

Fire Insurance Law, Homer H. Berger, Chairman

Property Damage Liability for Origin and Spread of Fire, George W. Clarke, Seattle, Washington

Marine and Inland Marine Insurance Law, George E. Beechwood, Chairman

Marine Insurance in the Development of the Orient, Miles F. York, San Francisco, California

Some Aspects and Anticipated Changes in Inland Marine Insurance, Fred Galbreath, San Francisco, California

ROUND TABLE VII.

Regulation of Insurance Companies, Cecil C. Fraizer, Chairman, Lincoln, Nebraska

Insurance Law Practice and Procedure, Forrest A. Betts, Chairman, Los Angeles, California

Relevance Under the Amended Discovery Rules, Lon Hocker, Jr., St. Louis, Missouri

7:00 P.M.
(Washington Athletic Club)
Reception

8:15 P.M.
Annual Dinner

Wednesday, September 8, 10:00 A.M.
General Session

Thomas Watters, Jr., Chairman, presiding

Address: Honorable James F. Malone, Jr., Commissioner of Insurance for the State of Pennsylvania, Harrisburg, Pennsylvania

Unfinished business

Committee reports

New business (Council reports and recommendations)

Miscellaneous business suggested by any committee or member

Report of Nominating Committee

Election of officers and members of Council

Introduction of new officers

Adjournment

JUDICIAL ADMINISTRATION

Sunday, September 5, 2:00 P.M.
(Olympic Hotel)
Meeting of Council

7:30 P.M.
(Olympic Hotel)
Dinner for Appellate Judges

Monday, September 6, 2:00 P.M.
(United States Court House)
General Session

Tuesday, September 7, 10:00 A.M.
(United States Court House)
General Session

2:00 P.M.
(United States Court House)

Pre-Trial Demonstration in the Federal Courtroom, by Chief Justice Bolitha J. Laws, District Court of the District of Columbia

Wednesday, September 8, 10:00 A.M.
(United States Court House)
General Session

7:30 P.M.
(Olympic Hotel)
Dinner

JUNIOR BAR CONFERENCE

Saturday, September 4, 9:00 A.M. and 2:00 P.M.
(Roosevelt Hotel)
Meeting of Council

Sunday, September 5, 9:00 A.M.
(Roosevelt Hotel)
Annual Meeting with the Junior Bar Conference of Delegates from Junior Bar Groups Affiliated with the Junior Bar Conference

12:30 P.M.
(American Legion Post)
Luncheon

Speaker to be announced

2:00 P.M.
(American Legion Post)
General Session

5:00 P.M.
(Camlin Hotel)
Reception

Monday, September 6, 2:00 P. M.
(Roosevelt Hotel)

Meeting of Resolutions Committee

3:00 P.M.

Meeting of Nominating Committee

3:00 P.M.
(Mayflower Hotel)

Small loan debate under auspices of Conference on Personal Finance Law

Tuesday, September 7, 9:00 A.M.
(American Legion Post)

General Session

12:30 P.M.
(Olympic Hotel)

Joint Luncheon with the Section of International and Comparative Law

12:00 P.M.
Balloting for officers and councilmen

2:00 P.M.
Meeting of newly elected officers and council

8:00 P. M.
(Arctic Club)

Dinner-Dance

LABOR RELATIONS LAW

Tuesday, September 7, 10:00 A.M.
(Teamsters Union Auditorium)

General Session

John M. Niehaus, Chairman, presiding
Call to order
Opening remarks by the Chairman
Appointment of Nominating Committee
Reports of Committees:
- Federal Legislation, Charles P. Taft, Chairman, Cincinnati, Ohio
- Improving the Administration of Union-Employer Contracts, W. Willard Wirtz, Chairman, Chicago, Illinois
- Improving Processes of Collective Bargaining, Nathan P. Feinsinger, Chairman, Madison, Wisconsin
- State Legislation, Archibald Cox, Chairman, Cambridge, Massachusetts
- Wage and Hour Legislation, Federal and State, Paul H. Sanders, Chairman, Berkley, California

2:00 P.M.
Debate on the new Taft-Hartley Act. Distinguished speakers from the ranks of both labor and management will lead the debate.
General discussion from the floor
Report of Nominating Committee
Election of officers and members of the Council
Unfinished business
New business

LEGAL EDUCATION AND ADMISSIONS TO THE BAR jointly with the NATIONAL CONFERENCE OF BAR EXAMINERS

Saturday, September 4, 2:00 P.M.
(Olympic Hotel)

Meeting of Council of Sections of Legal Education and Admissions to the Bar

Sunday, September 5, 10:00 A.M. and 2:00 P.M.
(Olympic Hotel)

Meeting of Council of Section of Legal Education and Admissions to the Bar

Tuesday, September 7, 9:00 A.M.
(Benjamin Franklin Hotel)

Meeting of National Conference of Bar Examiners

2:00 P.M.
(Benjamin Franklin Hotel)

General Session, Section of Legal Education and Admissions to the Bar

MINERAL LAW

Monday, September 6, 4:00 P.M.
(Olympic Hotel)

Meeting of Section Council and Committee Chairmen

Tuesday, September 7, 10:00 A.M.
Donald C. McCreery, Chairman, presiding
Opening remarks by Chairman, Donald C. McCreery, Denver, Colorado
Report of Secretary, Peter Q. Nyce, Washington, D.C.
Appointment of Nominating Committee
Report of Membership Committee, Calvin A. Brown, Chairman, Findlay, Ohio
Report of Special Publications Committee, Walace B. Hawkins, Chairman, Dallas, Texas
Report of Committee on Hard Metals, James T. Finlen, Jr., Chairman, Butte, Montana
Address: "Anticipating Legal Needs of the Hard Metals Industry", Francis J. Ryley, Phoenix, Arizona
Round Table Discussion. Robert M. Searls, San Francisco, California, presiding
- (a) Premium Prices for Metals
- (b) Royalty Basis for Hard Metal Leases on Public Lands
- (c) Stream Pollution
- (d) Conflict in Administration of Mining Laws and Taylor Grazing Act

Report of Committee on Coal, Forney Johnston, Chairman, Birmingham, Alabama
Round Table Discussion
- (a) Effect of Present Federal Statutes on Operations and Distribution in the Coal Industry
- (b) Industry-wide Bargaining
- (c) "Overtime" Decision of Supreme Court
- (d) The National Disaster—A Coal Strike

2:00 P.M.
William N. Bonner, Vice Chairman, Houston,Texas, presiding
Report of Committee on Natural Gas, Charles I. Francis, Chairman, Houston, Texas
Round Table Discussion. Marshall Newcomb, Dallas,

Texas, presiding
(a) Important Decisions of the Year
(b) Rate-making Policies of the Federal Power Commission
(c) Amendment of the Natural Gas Act

Report of Committee on Oil, Rex G. Baker, Chairman, Houston, Texas

Round Table Discussion. Mortimer Kline, Los Angeles, California, presiding
(a) Unlimited Opportunity for Expropriation of Property by Federal Government under "Tidelands decision" of the Supreme Court
(b) Political Pressure for Restoration of Governmental Controls in the Oil and Other Industries
(c) United States International Oil Policy
(d) Geological and Geophysical Prospecting and Research — Proper Federal Income Tax Deductions Therefor

7:30 P.M.
(Olympic Hotel)
Dinner

Address: "International Order and Justice under Law", Orie L. Phillips, Senior Judge, United States Circuit Court of Appeals for the Tenth Circuit

Address: "The Law of Humor and the Humor of Law", William W. Ray, Salt Lake City, Utah

Wednesday, September 8, 10:00 A.M.

Donald C. McCreery, Chairman, presiding

Address: "Anti-Trust Laws and Conservation of Oil and Gas", Robert E. Hardwicke, Fort Worth, Texas

Address: "The Encroachment by Federal Administrative Agencies, with Judicial Approval, upon the Structure and Substance of Constitutional Government", Ollie Roscoe McGuire, Washington, D.C.

New Business

Report of Nominating Committee

Election of Officers and Members of the Council

MUNICIPAL LAW

Monday, September 6, 2:00 P.M.
(Roosevelt Hotel)
General Session

Tuesday, September 7, 10:00 A.M. and 2:00 P.M.
General Session

PATENT, TRADE-MARK AND COPYRIGHT LAW

Sunday, September 5, 10:00 A.M. and 2:00 P.M.
(Olympic Hotel)
General Session

Monday, September 6, 12:30 P.M.
Luncheon
Under auspices of International Association for Protection of Industrial Property (American Group)

2:00 P.M.
General Session

Tuesday, September 7, 9:30 A.M. and 2:00 P.M.
General Session

7:30 P.M.
(Broadmoor Country Club)
Dinner

PUBLIC UTILITY LAW

Sunday, September 5, 2:00 P.M.
(Olympic Hotel)
Council Meeting

Monday, September 6, 2:00 P.M.
(Olympic Hotel)
General Session

1. Presentation of report by Frederick G. Hamley, Chairman
2. Panel Discussion:
   (a) Railroads: Kenneth F. Burgess, Chicago, Illinois
   (b) Motor Trucks and Buses: Jay S. Moltzner, Washington, D.C.
   (c) Communications: T. B. Price, New York, New York
   (d) Electric: Alan G. Paine, Spokane, Washington
   (e) Natural Gas: Francis L. Daily, Chicago, Illinois
   (f) Aviation: Speaker to be announced

Tuesday, September 7
Morning Session

Subject: Problems Under Federal Power Commission Regulation of the Natural Gas and Electric Industries
1. Natural Gas: Wm. Dougherty, New York, New York
2. The Miller Bills: Olcott D. Smith, Hartford, Connecticut
3. The Commission's Viewpoint: J. Bradford Ross, General Counsel, Federal Power Commission, Washington, D.C.

Afternoon Session

Subject: Current Developments in Rate Making
1. Communications: Tracy J. Peycke, Omaha, Nebraska
2. Electric and Gas: Paul W. McQuillen, New York, New York
3. Transit: F. G. Awalt, Washington, D.C.

Wednesday, September 8
(Broadmoor Country Club)
Dinner-Dance

TAXATION

Thursday, September 2, 10:00 A.M. and 2:00 P.M.
(Olympic Hotel)
Meeting of Council

Friday, September 3, 10:00 A.M. and 2:00 P.M.
Meeting of Council

Sunday, September 5, 10:00 A.M. and 2:00 P.M.

General Session

Monday, September 6, 2:00 P.M.

General Session

Tuesday, September 7, 10:00 A.M.

General Session

12:30 P.M.
(Chamber of Commerce Building)

Joint Luncheon with Section of Corporation, Banking and Mercantile Law

2:30 P.M.
(Chamber of Commerce Building)

Upon completion of the luncheon a general session of the Section of Taxation will be held in the same room

Wednesday, September 8, 10:00 A.M.
Committee on State and Local Taxes

Thursday, September 9, 10:00 A.M.
Committee on State and Local Taxes

REAL PROPERTY, PROBATE AND TRUST LAW

Monday, September 6, 12:00 M.
(New Washington Hotel)

Luncheon meeting of Officers and Members of the Council of the Section

Monday, September 6, 2:00 P.M.

General Session

William H. Dillon, Chairman, presiding
Address of welcome, A. C. Soelen, Corporation Counsel of Seattle
Report of Secretary, John J. Yowell, Chicago, Illinois

Program of Real Property Division

William L. Beers, Director, New Haven, Connecticut, presiding
Addresses:
"The Answer to Legal Problems Concerning G Bonds", by Edward F. Bartelt, Fiscal Assistant Secretary of the Treasury, Washington, D.C.
Three other addresses, subjects and speakers to be chosen
Appointment of Nominating Committee

Tuesday, September 7, 8:15 A.M.

Breakfast meeting of Members of Committees of Section

Tuesday, September 7, 9:30 A.M.

General Session

William H. Dillon, Chairman, presiding
Discussion of Proposed Uniform Ancillary Administration of Estates Act
(Referred to Section by House of Delegates)
Summary of Reports of Committees: (Each report will be limited to 5 minutes and there will be opportunity for discussion and questions from the floor after each report)

Committees of Real Property Law Division

Substantive Changes in Real Property Law, Edward C. King, Chairman, Boulder, Colorado
State and Federal Legislation Affecting Real Property, W. Carloss Morris, Jr., Chairman, Houston, Texas
Significant Decisions on Real Property Law, Ofell H. Johnson, Chairman, Seattle, Washington
Current Literature Relating to Real Property Law, Joseph R. Shaughnessy, Chairman, New York, New York
Planning, Rebuilding and Developing Metropolitan Communities, Harry M. Cross, Chairman, Seattle, Washington
Public and Private Housing, Robert Louis Hoguet, Chairman, New York, New York

Committees of Probate Law Division

Model Probate Code, R. G. Patton, Chairman, Minneapolis, Minnesota
Probate Judges, Charles A. Otto, Jr., Chairman, Elizabeth, New Jersey

Committees of Trust Law Division

Pension and Profit-Sharing Trusts, Bernard E. Farr, Chairman, New York, New York
Prudent-Man Rule for Trust Investments, Fred N. Oliver, Chairman, New York, New York

Joint Committees of Probate and Trust Law Division

Standard Clauses for Wills and Trusts, Morse Garwood, Chairman, Philadelphia, Pennsylvania
State and Federal Taxation, Joseph F. McCloy, Chairman, New York, New York
State Legislation Affecting Trusts and Estates, Harry Gershenson, Chairman, St. Louis, Missouri
Trust and Probate Decisions, H. E. Chenoweth, Chairman, Cleveland, Ohio
Trust and Probate Literature, Emma M. Cummings, Chairman, Boston, Massachusetts

Tuesday, September 7, 2:00 P.M.

General Session

Program of Probate and Trust Division

Eugene S. Lindemann, Director of Trust Law Division, Cleveland, Ohio, presiding
Addresses:
"A Comment on the Social Aspects of Estate Taxation," by Robert M. Alton, Portland Oregon, President, Trust Division, American Bankers Association
"Some Lessons from a Comparative Study of American Probate Legislation", by Lewis M. Simes, University of Michigan Law School
"Estate Planning under the New Tax Law", Don H. McLucas, Chicago, Illinois
Business session of Section, including election of Officers and Members of Council

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1948 Annual Meeting

5:00 P.M.
Meeting of newly elected Council and Officers
7:30 P.M.
(New Washington Hotel)

Annual Dinner
William H. Dillon, Chairman, presiding
For Members, Ladies and Guests.
Address: (Title and speaker to be selected)

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To the Members of the American Bar Association and of the House of Delegates:

■ The named members of the Rules and Calendar Committee of the House of Delegates have drafted and filed numerous and extensive amendments of the Constitution and By-laws of our Association, on which they will ask a vote of the members present at the Seattle meeting on September 6-9 and also the action of the House of Delegates. If approved by each the Assembly and the House under our Association's bicameral system, these changes in its organic law will take effect. In fulfillment of the constitutional requirements, the text of the proposed changes, with the names of their sponsors and the notice of filing, are published at length below.

All members of our Association are urged to examine the filed amendments and make up their minds as to their desirability. Members who cannot be present to vote in Seattle should let their views be known to the delegates from their States or other constituencies in the House of Delegates.

Several of the amendments constitute principally a rearrangement of material already in the Constitution and By-laws, in some instances with changes in wording. One or two of them, notably as to the issuance, printing and distribution of reports and other material of Sections and Committees, are offered as being needed for the better control and handling of the business and finances of the Association.

Several of the amendments are likely to be opposed in Seattle, and debate as to them will take considerable time in each the Assembly and the House. The most controversial change is the proposed extensive revision of Article I of the Constitution ("Object") as it has read and provided since the formation of our Association seventy years ago (aside from an addition made in 1936 to incorporate a constitutional basis for the federation and representation of State and local Bar Associations and other organizations of the legal profession). The advisability and need of changing the historic statement of purposes and attempting a further specification of objects has been at times debated, but previous votes have been adverse. (See " 'Object' of our Association", 34 A.B.A.J. 300; April, 1948).

The proposed amendment which would remove the *Journal* from its previous independent status in a separate article of the By-laws and group it with publications of Sections and Committees is opposed by the Editor-in-Chief, who strongly opposes also the proposal of the members of the Committee that the President of the Association shall be deprived of the status of being an ex *officio* member of the Board of Editors, as he has been since 1936, with marked advantages to the Association and the *Journal* from this close relationship of the two principal spokesmen of Association policy. The substitution of the Treasurer, the Association's financial officer, is not regarded as suitable. The unopposed nominee for President in 1948-49, Frank E. Holman, was one of the earliest members of the Advisory Board of the *Journal* and has taken marked interest in its work. The Presidents of the Association since 1936 have been highly useful members of the Board of Editors, and the Editor-in-Chief opposes a change from that make-up of the Board for the coming year. This and other controverted amendments will be decided by the votes of the members present in Seattle.

■ Notice is hereby given that Charles M. Lyman of New Haven, Connecticut; W. J. Jameson of Billings, Montana; William Logan Martin of Birmingham, Alabama; Franklin E. Parker, Jr., of New York City; and W. E. Stanley of Wichita, Kansas, members of the Association and members of the Committee on Rules and Calendar of the House of Delegates, have filed with the Secretary of the Association the following amendments to the Constitution of the Association:

(1) Amend Article I of the Constitution to read as follows:

ARTICLE I
NAME AND OBJECTS

The name of this Association shall be the American Bar Association. Its objects shall be to uphold and defend the Constitution of the United States;

to maintain our form of representative government provided under the Constitution; to advance the science of jurisprudence; to promote the uniformity of legislation and of judicial decisions throughout the nation; to uphold and maintain the honor, dignity and integrity of the bench and bar and of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American bar; and to correlate and promote such activities of the bar organizations of the nation as are within these objects, in the interest of the legal profession and of the public throughout the United States.

(2) Amend Article II, Section 3 of the Constitution to read as follows:

Section 3. *Expulsion and Reinstatement of Members.*—The Board of Governors may censure, suspend or expel any member for cause, after a hearing before such persons and in such manner as the Board of Governors shall direct, or may suspend or drop from membership any member for nonpayment of dues. Any member shall be automatically dropped from membership upon the filing by any person with the Secretary of a certified copy of the final order for the disbarment of such member by any tribunal of competent jurisdiction. Any member suspended, expelled or dropped from membership may be reinstated by the affirmative vote of a majority of the Board of Governors.

(3) Amend Article II, Section 4 of the Constitution by adding at the end of line 4 the words "or dropping," so that subsection (a) of said Section 4 shall read as follows:

(a) the expulsion or dropping of such member;

(4) Amend that portion of Article VI, Section 5 of the Constitution that commences after the period in line 29 to read as follows:

The term of each State Delegate shall begin with the adjournment of the annual meeting following his election and shall end with the adjournment of the third annual meeting thereafter. If a State Delegate from the continental United States shall fail to register in attendance at any annual meeting of the Association by twelve o'clock noon on the opening day thereof, the office of such State Delegate shall be deemed to be vacant; and thereupon the members of the Association present at the meeting from his State shall convene and elect a successor to serve for the unexpired term, if for one year, or, if for more than one year, until the vacancy shall be filled by nomination and election as hereinabove provided. In case there shall exist any vacancy in the office of State Delegate caused otherwise than by failure of the State Delegate to register at any annual meeting as aforesaid, the President of the Association, the member of the Board of Governors from the judicial circuit and the remaining members of the House of Delegates from the State in which the vacancy exists, shall elect in such manner as shall be determined by the Chairman of the House of Delegates, a successor to serve for the unexpired term if for one year or less, or, if for more than one year, until the vacancy shall be filled by nomination and election as hereinabove provided, and said Chairman, immediately upon learning of any such vacancy, shall be charged with the duty of carrying this provision into effect. In any case, when a vacancy shall have been filled by nomination and election as hereinabove provided, the nominated and elected successor shall serve for the unexpired term. In all elections a plurality of the votes cast shall elect. In case of a tie vote, the Board of Elections shall determine the choice by lot.

(5) Amend Article VII, Section 1 of the Constitution by striking out from lines 10-12 the following:

. . . "by election, as herein provided, and until such election shall be held and a successor shall have been qualified, such vacancy shall be filled"

so that the amended sentence will read

If the office of an elective member of the Board of Governors shall become vacant, such office shall be filled for the unexpired term by a person chosen by the President of the Association and the members of the House of Delegates from the judicial circuit in which the vacancy exists, in such manner as shall be determined by the Chairman of the House of Delegates.

(6) Amend Article X, Sections 1 to 5, inclusive, of the Constitution to read as follows:

ARTICLE X

SECTIONS

Section 1. *Designation.*—There shall be Sections for carrying on the work of the Association, each within the jurisdiction defined by its By-Laws, as follows:

Section of Administrative Law
Section of Bar Activities
Section of Corporation, Banking and Mercantile Law
Section of Criminal Law
Section of Insurance Law
Section of International and Comparative Law
Section of Judicial Administration
Section of Labor Relations Law
Section of Legal Education and Admissions to the Bar
Section of Mineral Law
Section of Municipal Law
Section of Patent, Trade-Mark and Copyright Law
Section of Public Utility Law
Section of Real Property, Probate and Trust Law
Section of Taxation
Junior Bar Conference

Section 2. *Establishment, Combination, and Discontinuance.*—New Sections may be established and existing Sections may be combined or discontinued by the House of Delegates, after a report by the Board of Governors, in the manner provided by the By-Laws, and the foregoing list shall be automatically changed in accordance with the action so taken.

Section 3. *By-Laws.*—Each Section shall have By-Laws not inconsistent with the Constitution and By-Laws of the Association. Section By-Laws or amendments thereof shall become effective when approved by the House of Delegates, after a report by the Board of Governors.

(7) Amend Article IX of the By-Laws to read as follows:[1]

ARTICLE IX

SECTIONS

Section 1. *Establishing or Combining Sections.*—Sections may be established or combined by the House of Delegates by two-thirds vote, after a report by the Board of Governors on the proposal therefor. The report shall state the views of the Board and shall show substantial compliance with the following requirements:

(a) That the proponents of the proposed Section, at least six months prior to the meeting of the House of Delegates at which action upon the proposal is contemplated by the proponents thereof, have filed with the Secretary a statement setting forth:

(1) The contemplated jurisdiction of the Section, which shall be within the constitutional objects of the Association and not in substantial conflict with the jurisdiction of any Section, Standing Committee or Special Committee the continuance of which is contemplated after the Section is established;

(2) The proposed By-Laws of the Section, which shall contain a definition of its jurisdiction;

(3) The names of the proposed Committees of the Section;

1. This amends the substance of present Article XII and re-locates it.

(4) The proposed budget of the Section for the first two years of its operations;

(5) A list of present and prospective members of the Association who have signed statements that they will apply for membership in the Section;

(6) A list of organizations that have demonstrated a continuing interest in the objects of the proposed Section;

(7) In the case of a combination of Sections, a statement of any jurisdiction that will not be carried into the combination;

(b) That the Board of Governors has given notice of its report to the members of the Association, by publication of the report or a summary thereof in the American Bar Association JOURNAL or other news publication of the Association, or by mail, at least thirty days before the meeting of the House of Delegates at which consideration of the proposal will take place.

Section 2. *Discontinuance of Sections.*—Sections may be discontinued by the House of Delegates by a two-thirds vote, after a report by the Board of Governors, but only after notice thereof as provided in Section (1) (b) of this article.

Section 3. *Membership of Sections.*—All members of Sections, of any class, shall be members of the American Bar Association and shall meet the requirements of the By-Laws of the respective Sections.

Section 4. *Section Officers and Council.*—Each Section shall have a Chairman, a Council, and such other officers as the Section By-Laws may provide. The Council shall consist of the officers ex officio and such members as may be provided by the Section By-Laws.

Section 5. *Section Dues.*—Members of any Section may be required to pay Section dues in such amount and for such purposes as the Section, with the approval of the Board of Governors or the House of Delegates, may from time to time determine.

Section 6. *Meetings of Sections.*—Each Section shall meet immediately preceding or during the period of the annual meeting as the Board of Governors may direct. No Section shall call a regular or special meeting otherwise than at the time and place of the annual meeting, unless previously authorized by the Board of Governors.

Section 7. *Publication of Proceedings of Sections.*—The proceedings of any Section may be published, in the discretion of the Board of Governors.

Section 8. *Conference of Sections with National Conference of Commissioners on Uniform State Laws.*—Whenever a Section is considering any subject in the field of uniform state legislation, it shall notify and consult with the National Conference of Commissioners on Uniform State Laws. In the event of a disagreement between a Section and the National Conference, the Section shall refer the matter to the Board of Governors for its decision.

Section 9. *Reports, recommendations, expenses and actions* of Sections shall be governed by the provisions of Articles XI, XII and XIII.

Section 10. *Meeting of Section Chairmen.*—A meeting of Section chairmen shall be held not later than sixty days after each annual meeting of the Association, at the time and place prescribed by the Board of Governors. Notice of the time and place thereof shall be promptly given by the Secretary.

(8) Renumber Articles XI, XII and XIII of the Constitution to Articles XII, XIII and XIV and insert the following:

ARTICLE XI
COMMITTEES

Section 1. Committees may be employed for the promotion of the objects of the Association, and shall consist of limited numbers of members, with their number, jurisdiction, method of selection and their tenure determined in accordance with the By-Laws.

Section 2. Committees may be established, combined or discontinued in the manner provided in the Constitution or in the By-Laws.

(9) Amend Article X, Sections 1 to 22, inclusive, of the By-Laws to read as follows:

ARTICLE X
COMMITTEES

Section 1. *Classification of Committees.*—The classes of committees of the Association shall be:

(a) Standing Committees, created by the By-Laws for the investigation and study of matters relating to the accomplishment of the general purposes, business and objects of the Association of a continuous and recurring character, within the limitations of the powers conferred.

(b) Special Committees, created by resolution of the Board of Governors or the House of Delegates, defining the powers and duties of such committees, to investigate and study matters relating to specific purposes, business and objects of the Association of an immediate or non-recurring character. The life of any Special Committee shall continue until the end of the next annual meeting following its creation unless continued by action of the House of Delegates.

(c) Advisory Committees, created by action of the House of Delegates and associated with any Standing or Special Committee of the Association, for the purpose of enabling such Standing or Special Committee to have the advice and opinion of a cross section of the legal profession of the United States. An Advisory Committee shall function under the direction and supervision of the Committee to which it is related.

Section 2. *Appointment.*—Unless otherwise stated in the provision creating a Committee, appointment of members to serve on Committees of the Association shall be made by the President for the terms provided in the By-Laws. The Chairman of every Committee shall be designated annually by the President. In the event of the resignation, death or disqualification of any member of the Committee, the President shall appoint a successor to serve for the unexpired term.

Section 3. *Number of Members and Tenure.*—The number and tenure of members of the Committees of the Association shall be:

(a) *Standing Committees.* Unless the By-Laws otherwise specially provide, each Standing Committee shall consist of six members, each of whom shall serve until the adjournment of the third annual meeting following his appointment and until his successor is appointed, and from whom the President shall designate a chairman annually; provided that, in the original appointment of each Committee under this provision, the President shall designate two members to serve until the adjournment of the first annual meeting following their appointment, two to serve until the adjournment of the second annual meeting following their appointment and two to serve until the adjournment of the third annual meeting following their appointment, but thereafter successors shall be appointed for three-year terms.

(b) *Special Committees.* Each Special Committee shall consist of a Chairman and four members, unless a different number be designated by the resolution creating it, and each member shall serve until the adjournment of the next annual meeting following his appointment.

(c) *Advisory Committees.* The numbers of members of each Advisory Committee shall be designated by the resolution creating it, and each member shall serve until the adjournment

of the annual meeting following his appointment.

Section 4. *Secretary.*—The Chairman of each Committee shall designate one of the members thereof as secretary. It shall be the duty of the secretary to keep minutes of the proceedings of the Committee, the subjects under consideration and the action with respect thereto, and at the close of each Association year to forward the same to the Executive Secretary of the Association for filing for the use of the Association.

Section 5. *Meetings.*—Meetings of each Committee shall be held upon call of its Chairman.

Section 6. *Conference of Committees with Commissioners on Uniform State Laws.*—Whenever a Committee is considering any subject in the field of uniform state legislation, it shall notify and consult with the National Conference of Commissioners on Uniform State Laws. In the event of a disagreement between a Committee and the National Conference, the Committee shall refer the matter to the Board of Governors for its decision.

Section 7. *Designation of Standing Committees.*—There shall be Standing Committees on:

Admiralty and Maritime Law
Aeronautical Law
American Citizenship
Commerce
Communications
Employment and Social Security
Jurisprudence and Law Reform
Legal Aid Work
Professional Ethics and Grievances
Public Relations
Resolutions
Scope and Correlation of Work
State Legislation and
Unauthorized Practice of the Law

Section 8. *Jurisdiction and Special Tenures of Standing Committees.*

(a) *Committee on Admiralty and Maritime Law.* This Committee shall have jurisdiction of all questions in the field of admiralty and maritime law.

(b) *Committee on Aeronautical Law.* This Committee shall have jurisdiction of all questions in the field of aeronautics.

(c) *Committee on American Citizenship.* This Committee shall have jurisdiction of all questions in the field of American citizenship and of the American form of government with respect to public education and understanding of both the privileges and the responsibilities thereof.

(d) *Committee on Commerce.* This Committee shall have jurisdiction of all questions in the field of interstate or foreign commerce.

(e) *Committee on Communications.* This Committee shall have jurisdiction of all questions in the field of the transmission of intelligence through the application of electrical energy or other use of electricity, whether by wire or wireless.

(f) *Committee on Employment and Social Security.* This Committee shall have jurisdiction of all questions in the field of existing and proposed laws and regulations concerning employment and social security, including workmen's compensation, unemployment compensation, old age payments, health insurance, safety measures in industry and related matters.

(g) *Committee on Jurisprudence and Law Reform.* This Committee shall have jurisdiction of all questions in the field of the jurisdiction and procedure in the federal courts, including reforms of the substantive law, except as to matters within the jurisdiction of a Section or another Committee.

(h) *Committee on Legal Aid Work.* This Committee shall have jurisdiction of all questions in the field of legal aid, with respect to (1) administration of justice as it affects poor persons throughout the country, (2) remedial measures intended to assist poor persons in the protection of their legal rights, (3) the establishment and efficient maintenance of legal aid organizations and (4) cooperation with other agencies, both public and private, interested in these objects.

(i) *Committee on Professional Ethics and Grievances.* This Committee shall:

(1) Formulate and recommend standards and methods for the effective enforcement of high standards of ethics and conduct in the practice of law as a profession; develop and recommend improved disciplinary methods and procedures; cooperate with the disciplinary tribunals or committees established by courts or other public authority; consider the Canons of Ethics of the legal profession and of judicial officers and the observance thereof; and make recommendations for amendments to or clarifications of the Canons of Ethics when the same may appear to be advisable.

(2) Upon request, advise or assist state and local bar associations in their activities in respect to the professional conduct of lawyers and the ethics of the profession; make such investigations of professional conduct and of abuses in connection with the practice of law as may be directed by the House of Delegates or the Board of Governors; furnish information and make recommendations on the foregoing subjects to the House of Delegates or the Board of Governors; provided, however, that where investigations of facts are involved in any pending matter, the Committee may refer the same, for investigation and report in the first instance, to the appropriate tribunal or committee within the state or to the appropriate state or local bar association;

(3) Be authorized, when consulted by any member of the bar or by any officer or committee of a state or local bar association, to express its opinion concerning proper professional or judicial conduct, but such opinions shall not deal with questions of judicial decision or judicial discretion, and shall not be given until considered by the Committee and approved by a majority thereof.

(4) Be authorized to consider all information as to the professional conduct and, except as hereinafter limited, the judicial conduct of any member of the Association and to proceed in accordance with rules adopted and approved as provided in sub-paragraph (5) of this section, upon its own motion or upon complaint preferred. After a hearing thereon, the Committee may recommend to the Board of Governors the censure, public or private, or expulsion of such member; and such censure or expulsion shall become effective on approval of such recommendations by the Board of Governors.

(5) Be authorized to adopt such rules as it may deem desirable concerning the methods and procedure to be used in expressing opinions, in making investigations, in the hearing of complaints and taking of testimony; such rules not to become effective until approved by the Board of Governors. The rules may be altered or abrogated by the House of Delegates.

(j) *Committee on Public Relations.* (1) This Committee shall consist of:

(a) Five members nominated by the President and confirmed by the Board of Governors and the House of Delegates, one member to be designated in each year for a term of five years. In the event of a vacancy a successor for the unexpired term shall be chosen in the manner herein provided.

(b) One member to be designated annually by the Board of Editors.

(c) Three ex officio members, to wit, the President, the Chairman of the House of Delegates and the Director of the Public Information

Program of the Junior Bar Conference.

The elected members shall be chosen in the following manner: The President shall nominate the member or members of the committee and such nomination, upon confirmation and approval by the Board of Governors, shall then be submitted to the House of Delegates, and upon confirmation and approval by the House of Delegates the nominee or nominees shall thereupon become a member or members of the Committee for the terms designated.

(2) The Committee on Public Relations shall prepare and present to the House of Delegates plans for advancing public acceptance of the objects of the Association. The committee shall have the responsibility of giving effect to such plans as are approved by the House of Delegates or, when occasion may require, by the Board of Governors.

(k) *Committee on Resolutions.* This Committee shall be appointed annually and shall consist of such number of members as may be suggested by the President and approved by the Board of Governors, and shall be charged with carrying out the duties set forth in the Constitution and By-Laws.

(l) *Committee on Scope and Correlation of Work.*

(1) This Committee shall study the structure, function and work of the various Standing and Special Committees, the Sections and other agencies of the Association, and shall be charged with the duty of making such recommendations to the House of Delegates or to the Board of Governors or to both from time to time as it deems to be advisable, in the interest of better correlation of the work of the Association as a whole and the better utilization of the resources of the Association. The Committee shall be responsible to the House of Delegates and shall have no duties or powers except those of studying the work of the Association as a whole and making recommendations on the matters hereinbefore provided.

(2) One member of the Committee shall be elected in each year by the House of Delegates from the membership of the Association, to serve for a five-year term beginning with the adjournment of the annual meeting at which he is elected. Nominations shall be made from the floor at the first session of the House of Delegates at the annual meeting, and elections shall be by written or printed ballots at the next session.

(m) *Committee on State Legislation.* This Committee shall consist of a chairman and a vice-chairman appointed biannually at the adjournment of the annual meeting in odd-numbered years, and two members in each state, appointed at the adjournment of the annual meeting in the year in which there is a meeting of the legislature in their respective states. This committee shall endeavor to secure the enactment in their respective states of legislation approved by the Association and recommended by it to the state legislature for adoption, and shall cooperate with the Commissioners from their state in the National Conference of Commissioners on Uniform State Laws, in securing the adoption in their respective states of the acts recommended by the Conference and approved by the Association.

(n) *Committee on Unauthorized Practice of the Law.* This Committee shall keep itself and the Association informed with respect to the unauthorized practice of law by laymen and by lay agencies and the participation of attorneys in the latter, and concerning methods for the prevention thereof. The Committee shall seek the elimination of such unauthorized practice and participation by such action and methods as may be appropriate for that purpose, including cooperation with, and assistance and advice to, state, district and local bar associations and other organizations.

Section 9. *General Duties.*—It shall be the duty of every Committee to carry into effect its own recommendations in the manner and to the extent authorized or directed by the House of Delegates or by the Board of Governors, but it shall not incur expense thereunder beyond its own budget without specific authorization.

Section 10. *Reports, recommendations, expenses and actions* of Committees shall be governed by the provisions of Articles XI, XII and XIII of the By-Laws.

(10) Amend Article XI of the By-Laws to read as follows:[2]

ARTICLE XI

REPORTS OF SECTIONS AND COMMITTEES

Section 1. Each Section and Committee of the Association shall, on or before the date prior to a meeting of the Association or of the House of Delegates fixed by the Board of Governors, prepare and transmit to the House of Delegates through the Board of Governors its written report covering a summary of its activities and its recommendations for Association action, if any.

Section 2. Each report recommending Association action:

(a) Shall be printed or mimeographed and distributed to the members of the House of Delegates prior to the session at which the report is to be considered, and, unless otherwise ordered by the Board of Governors, all committee reports shall be distributed by mail to the members of the House of Delegates by the Secretary at least 30 days before the annual meeting and at least 10 days before any other meeting.

(b) Shall have each recommendation set forth at the head of the report as a recommendation so as to distinguish readily the recommendation from the body of the report, and the body of the report shall contain no language that may be construed as committing the Association to any policy not contained in the recommendation.

(c) Shall contain a statement of the reasons for the recommendations contained therein.

(d) Shall, when legislation is proposed or opposed, contain a complete summary of the legislation under consideration, and the Section or Committee reporting shall make available 50 copies of the legislative bill under consideration, for distribution at the meeting of the House of Delegates at which the report is to be considered.

(e) Shall, if the recommendation contemplates action that may result in expenditures, contain in the body of the report an estimate of the amount that will be required.

Section 3. No report recommending Association action shall be considered by the House of Delegates unless there shall have been compliance with the provisions of section 2 of this Article or unless compliance is waived by a two-thirds vote of the House of Delegates upon recommendation of the Committee on Rules and Calendar. Any Section or Committee desiring a waiver shall give written notice thereof and of the reasons therefor to the Chairman of the Committee on Rules and Calendar at least 10 days before the presentation of the report.

Section 4. Nothing in this Article shall preclude any dues-paying Section from publishing and forwarding to its members reports of the Section and the Committees thereof, if section funds are available for such purpose, subject to Articles XII and XIII hereof.

(11) Amend Rule I, Section 4, of the Rules of Procedure of the

2. This Article is new material; the substance of the present Article XI being re-located to Article XII.

House of Delegates by striking out the last sentence, which now reads as follows:

For an annual meeting of the House, the reports of Sections and Committees, pursuant to Article X, Section 4, of the Constitution, shall be seasonably transmitted by the Secretary to the members of the House.

(12) Amend Article XII Sections 1 to 7, inclusive, of the By-Laws to read as follows:[3]

ARTICLE XII

REPRESENTATION OF THE ASSOCIATION

Section 1. No Section or Committee or member thereof shall assume to represent the Association or any Section or Committee thereof before any legislative body, in any Court or before any other tribunal, unless authorized so to do by the House of Delegates or by the Board of Governors. Whenever representation requires the filing of any brief, other than a brief filed with a legislative committee, a substantial copy of the proposed brief shall, before it is filed, be submitted to and approved by the Board of Governors or such of its members as the Board may designate to act for it.

Section 2. No report, recommendation or other action of any Section or Committee thereof, or of any Committee of the Association, shall be considered as the action of the Association unless and until it shall have been approved or authorized by the House of Delegates or by the Board of Governors. Any printed material containing any report, recommendation or proposal circulated by any Section or Committee thereof, or by any Committee of the Association shall have clearly indicated thereon that the same does not represent the view or action of the Association, unless the House of Delegates or the Board of Governors shall have taken approving action with respect thereto.

(13) Amend Article XIII of the By-Laws to read as follows:[4]

ARTICLE XIII

APPROPRIATIONS AND EXPENSES

Section 1. Appropriations of Association funds shall be made by the House of Delegates or the Board of Governors. Any proposal for an appropriation originating in the House of Delegates shall not be acted upon except after a report as to its feasibility from the Board of Governors.

Section 2. Duly authorized expenses incurred in the conduct of the affairs of the Association shall be paid by the Treasurer out of such appropriations as shall have been made for such purposes.

Section 3. Expenditures out of the dues of Sections, whether current or accumulated, shall be made only by authority of the Section or the Council of the Section, and the Treasurer shall pay out of such dues such amounts as the Chairman of the Section shall certify to have been so authorized.

Section 4. No appropriation shall be made for traveling expenses of any member of any Advisory Committee as such, nor shall any appropriation be made for the traveling or other expenses of any member of the Board of Governors or of the House of Delegates or of any Section or Committee that are necessary and appropriate to and arise out of attendance as such at the annual meeting of the Association.

Section 5. Vouchers shall be in such form, and provided by such authority, as the Board of Governors shall from time to time prescribe.

Section 6. The financial liability of the Association to any Section or Committee or to the National Conference of Commissioners on Uniform State Laws shall be limited to the funds accredited to it and shall cease upon payment by the Treasurer of that amount.

Section 7. Any liability incurred by any Section or Committee, or member thereof, in excess of the funds in the hands of the Treasurer accredited to it, shall be the personal liability of the person or persons responsible for incurring or authorizing the same.

(14) Amend Article IV of the By-Laws to read as follows:[5]

ARTICLE IV

PUBLICATIONS

Section 1. The American Bar Association Journal, and such other periodicals as the Board of Governors shall determine, shall be conducted by a Board of Editors, ten in number, which shall consist of the following:

(a) The Editor-in-Chief, who at the time of his election need not be a member of the Board of Editors, shall be elected by the other members of the Board, and shall hold office at their pleasure;

(b) The Chairman of the House of Delegates and the Treasurer of the Association, who shall be members *ex officio*;

(c) Seven other members, to be elected by the Board of Governors as follows: one member of the Board of Editors shall be elected in each year except in the years when the terms of three members expire. Elections shall be for a five-year term, but vacancies shall be filled by the Board of Governors for the unexpired term. Whenever the term of office of an elected member of the Board of Editors expires, a successor shall be elected from the membership of the Association by the Board of Governors, for the term of five years from the next ensuing annual meeting of the Association and thereafter, as such expirations arise, successors shall be similarly elected for the term of five years.

Section 2. The Board of Editors may appoint a Managing Editor or Editors and such other employees as they may deem necessary or advantageous, and shall have the management of the Journal and other periodicals and of their financial affairs. The acts and proceedings of the Board of Editors shall be reported to the Board of Governors, and the Board of Governors may by vote of a majority of all its members disapprove or rescind an action or appointment of the Board of Editors. All the revenues of the Journal and other periodicals, from whatever source derived, shall be transmitted forthwith to the Treasurer of the Association; and their bills shall be paid by the Treasurer upon the presentation of proper vouchers. The Board of Editors may create and select an Advisory Board or Boards for the Journal and the other periodicals or for any of them separately.

Section 3. The annual reports of the Association and all publications of the Association other than those provided for in Section 1 of this Article, and all publications of the Sections and Committees of the Association shall be issued and distributed upon such terms and conditions as the Board of Governors shall provide.

JOSEPH D. STECHER,
Secretary
American Bar Association

3. This amends the substance of present Article XI and re-locates it.

4. This is new material; the present Article XIII, being obsolete, is deleted.

5. This amends the substance of present Article IX and combines it with present Article IV, which is also amended.

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American Law Institute:

"Silver Anniversary" Meeting Held May 20-22

■ A significant manifestation of the trends in the work for the public and the profession, by organizations affiliated and cooperating with the American Bar Association and represented in its House of Delegates (Constitution, Article VI, Section 8), was the twenty-fifth Annual Meeting of the American Law Institute in Washington May 20-22. Due to the joint sessions with the National Conference of Commissioners on Uniform State Laws, also closely identified with our Association, and other factors, the attendance at the meeting was one of the largest in the history of the Institute. Whereas for many years the principal work of the Institute was on the Restatement of existing law, the current activities, under the leadership of President Harrison Tweed, are devoted largely to a few carefully selected projects, for the most part legislative in character and related to the law as the judges, law teachers, and practicing lawyers who compromise the Institute think the law should be.

An impressive showing of substantial progress on practical projects of public usefulness was reflected in the sessions. Various articles of the proposed Commercial Code were intensively studied and animatedly debated, to a point where the completion of the Code in 1949 seems to be in sight. A project for the expert drafting of a simplified, understandable and acceptable income tax law was outlined as in its early stages. A determined effort was made to place on a feasible footing the joint venture of the Institute and our Association for continuing legal education on a nation-wide basis. Grants-in-aid for the staffing of each of these undertakings have been obtained by the Institute from foundations. Encouraging reports were received as to the initial acceptance, by several States, of the Youth Correction Authority Act, prepared under the auspices of the Institute. At the opening session, Mr. Justice Robert H. Jackson spoke as the representative of the Supreme Court; the forthright views which he expressed, as reported elsewhere in this issue, were doubtless his own. Mr. Justice Felix Frankfurter was the guest speaker at the Annual Dinner; we hope to obtain for our following issue an approved text of his erudite address. Editorials in this issue comment on several aspects of the notable meeting reported below.

■ As Director of the Institute, United States Circuit Judge Herbert M. Goodrich gave a vigorous report reviewing activities of the Institute. Foremost among those of earlier years has been the Restatement of the Law and the increasing use of the fruits of that work, by lawyers and Courts. As of April of 1948, there have been more than 15,000 citations to the Restatement by State and federal Courts. The greatest number has been to the volumes on Torts (3793) and Contracts (3525). Following in order are the Restatements of Trusts, Agency, Conflict of Laws, Restitution, Property, Judgments, and Security.

Annotations to the Restatement, the Director noted, now total 137. This program is being brought to a close; all outstanding annotations are to be completed by the end of 1950. There has been an interesting correlation between the law as stated in the Restatement and the law of the individual States as shown in the Annotations. It has been demonstrated that there is essentially a common law throughout the United States and that the Restatement has succeeded, in almost every instance, in stating it the way the Courts have decided it.

Interesting but not generally known is the use of the Restatement abroad. The volume on Conflict of Laws appeared in a French edition in 1938 and has become a standard reference in civil law countries. Leading treatises in the principal continental countries refer to the Restatement. The Institute is continuing its efforts to have the Restatement translated into Spanish. The Fifth Conference of the Inter-American Bar Association adopted a resolution in favor of such a translation. The fruition of such a project will await the securing of sufficient means.

Director Goodrich discussed a special report on the extent of the use of the model Code of Criminal Procedure approved by the Institute in 1930. Twenty-three States have adopted parts of the Code, the adoptions running from a few sections to the entire Code, as in Arizona. Copies of the report, which lists the adoptions by States and sections, may be obtained from the Institute.

Director Goodrich Explains the Work on a Commercial Code

The principal present activity of the Institute, the Commercial Code, was discussed at length in the Director's report; hereinafter is an account of the discussions at the meeting. The Code has progressed to a point where its over-all plan is emerging. Our readers will be interested in the Director's outline of its scope and content:

Article I: The first Article is entitled "General Provisions, Including Definitions." It will apply to the Code as a whole and will, as the title indicates, contain definitions of terms common to all the Articles, irrespective of their subject matter, as well as other provisions of general applicability.

Article II: This is the Sales Article of the Code, constituting essentially an up-to-date revision and expansion of the old Uniform Sales Act, generally in terms of modern commercial case law. The work on this Article is now completed.

The Article is sub-divided in six major parts:

Part I deals with matters of General Construction, Application and Subject-matter of the Act.

Part II covers Form, Formation and Construction of The Contract.

Part III is entitled Title and Documents of Title, Creditors and Good Faith Purchasers.

Part IV is concerned with Performance.

Part V covers Breach and Repudiation.

Part VI provides for Remedies of the buyer and seller. All in all this Article contains 133 sections.

Article III: This Article is entitled "Commercial Paper." It generally covers matters provided for by the Uniform Negotiable Instruments Law with some important departures, however. Thus, sections from the N. I. L. dealing with Acceptance for Honor and Payment for Honor have been eliminated because they are now obsolete practices. N. I. L. sections concerning solely matters of foreign trade, such as Bills in a Set, have been deleted and are covered by the Article dealing with Foreign Banking. Provisions dealing with secured paper and matters relating to corporate securities have also been omitted, they being provided for respectively by the Articles of the Code concerned with Secured Commercial Transactions and Investment Instruments. It is also presently planned to include in this Article matters dealing with Bank Collections.

While Article III deals with negotiability, other Articles, particularly Articles IV, V and VI, also deal with negotiability and one of the advantages of the Code approach, heretofore lacking, will be the uniformity of treatment accorded to this important phase of commercial transactions.

HARRISON TWEED

HERBERT F. GOODRICH

Article IV: This Article is concerned with Bank Operations and Foreign Banking. Chapter I deals with Letters of Credit. Chapter II covers Foreign Remittances. Other parts of this Article will cover transfers of large "clean" credits and the regulation of certain bookkeeping practices in international banking which vary from domestic practices.

Article V: This Article deals with Investment Instruments. It takes out of the present N. I. L. bearer or registered bonds and includes certificates of stock now provided for by the Uniform Stock Transfer Act. It will cover additional types of investment paper, other than paper falling within the scope of Article VII on Secured Commercial Transactions.

Article VI: Intended originally to cover only bills of lading and warehouse receipts, this Article has been somewhat expanded in scope and is now entitled "Documents of Title." It represents primarily a consolidation of the Uniform Warehouse Receipts Act and the Uniform Bills of Lading Act, excluding the Negotiation and Transfer sections, which are covered by the Sales Article, and the Criminal Offenses provisions of those Acts. The Article is primarily concerned with the definition of the contract-bailment obligation of the possessor of goods to the person to whom he has undertaken to deliver.

Article VII: "Secured Commercial Transactions." This Article will embrace the complex security transactions now dealt with as chattel mortgages, conditional sales, trust receipts, assignments of accounts receivable and field warehousing and pledge. It will deal with security taken in goods and account.

Six major categories of financing, as follows, are contemplated to be provided for:

1. Consumer credit transactions
2. Agriculture financing
3. Inventory financing
4. Pledge and field warehousing
5. Industrial equipment credit financing
6. Single venture financing

The question of whether the closely related field of Bulk Sales should be included in this Article is still under consideration, but the

general filing machinery developed in regard to inventory liens may well prove to be an improvement on the present machinery for controlling sales in bulk by retailers.

Article VIII: Work on this Article, entitled "Commercial Agency," is just beginning.

Scope and Plan as to Prospect for Modernized Income Tax Law

Of the new projects being undertaken, the first is the program on continuing legal education, previously reported in 34 A.B.A.J. 3; January, 1948. The other is in the field of income tax law. The latter was discussed at the 1947 meeting of the Institute (33 A.B.A.J. 705; July, 1947). The Maurice and Laura Falk Foundation of Pittsburgh has since granted the Institute a subvention for the work. The first task has been to define what the project will cover. At one of the first meetings, two experts in the field of taxation submitted statements addressed to that problem. The Director read those statements, here marked "A" and "B" respectively, to center attention on what they proposed:

STATEMENT "A"

"The ultimate objective of the income tax project is to prepare, after thorough impartial study and discussion, an improved and modernized income tax statute with explanatory comments, which will be presented, in whole or from time to time in part, for such consideration as Congress may wish to give it. It is proposed, not to deal with essentially economic and political aspects of the tax law such as rates, exemptions, treatment of capital gains and the like, but to undertake what is fundamentally a stocktaking and overhauling project, it being recognized of course that policy questions on a lower level will inevitably be involved.

In drafting the statute the aims will be:

(1) to take into account and coordinate with the statute the substantial body of judicial decisions so that the statute will reflect such part of the judicial interpretation as may be desired to be retained;

(2) to incorporate, or propose in the alternative, improvements within the limits of established policy and such other improvements, believed to be generally acceptable, as may appear to be desirable, it being understood that all such changes will be pointed out and explained to facilitate legislative consideration and determination;

(3) to eliminate so far as possible inconsistencies in the present statute and the importance of methods of procedure; and

(4) to make the statute more clear and understandable, and so far as possible more simple and less likely to be subject to repeated patchwork amendment, than the present one."

STATEMENT "B"

"A definition of the scope of the project cannot be exact at this early stage, but certain items of inclusion and exclusion can now be tentatively stated with some degree of precision. The study will exclude problems predominantly involving the rate and exemption structure where answers depend largely upon revenue considerations or the economic condition of the country at a particular moment. Answers to questions of this character cannot have even relative permanence; they must be faced each year in the light of the conditions then confronting the country. The same considerations apply to a number of policy problems on a lower level, such as the treatment of capital gains and losses, etc.

On the other hand, it is recognized that any proposed revision of the income tax statute, to have value, must make certain policy assumptions, and that a number of relatively minor policy decisions must be made as a basis for any intelligible reconstruction of the statute. The general rule to be followed will be to take the content of the statute as we find it, or as we think it is apt to be in the reasonably near future, and to make policy decisions in a restricted area where the revenue is not greatly affected, where economic factors need not play a prominent role, and where reasonable certainty as to the meaning of the statute is more important than economic considerations.

The next aspect of the project is essentially one of codification. This is a job of synthesizing into one organized statute a large body of tax common law which has evolved over the years from thousands of court decisions and administrative rulings, but which is now absent from the statute itself (Example—business purpose). This will require an examination of all court decisions, Treasury rulings, and other tax material, and the formulation into a coordinated aggregate of the existing statute and all outstanding judicial and administrative interpretations. Of course, no attempt will be made to freeze the process of future interpretation and adaptation to new needs and developments; the process would be one of bringing the statute up to date.

Once the objectives of the new statute are clear, attention will be devoted to the task of expressing what is intended in simple language, not necessarily language that a layman can quickly understand, but at least language that lawyers can understand with sufficient precision to make reasonable predictions as to the results of transactions placed before them by clients. This part of the work may involve a discard of present approaches to the matter of legislative draftmanship and the development of a new drafting technique."

Recent Work Largely in the Legislative Field

The Institute has appointed as Chief Reporter for the income tax project Professor Stanley S. Surrey, of the University of California, and as Assistant Chief Reporter, Professor William C. Warren, of Columbia University, at present Tax Consultant to the Secretary of the Treasury. Although the comment was made by practicing lawyers present that the work has been put largely into the hands of law school professors rather than men who are dealing with tax problems day-by-day in a practical way for taxpayers or the government, it is hoped that this can be overcome as planning and drafts proceed. First results of their work will be discussed at the 1949 Annual Meeting, in Washington next May 18-21.

In closing, the Director noted that unlike the labors on the Restatement, the recent work of the Institute has been in the legislative field and has permitted a statement by the Institute as to what the law should be rather than what the law is. Although in this work the Institute is and will be in a controversial field, the profession and the public need have no fear on that account. Important questions involve differences of opinion but the legal profession is accustomed to such differences. He declared that the Institute can and will treat such

questions with great fairmindedness and expertness.

Youth Correction Authority Act Makes Headway

Another important report was that of John R. Ellingston, the Institute's Special Adviser on Criminal Justice —Youth. In 1938 the Institute entered on a study of youth correction problems. A result was the Institute's model Youth Correction Authority Act, which fits such tools as pre-sentence investigation, diagnosis, the indeterminate sentence, treatment aimed at basic difficulties rather than at symptoms, probation and parole, into an efficient legal mechanism that is for the first time capable of giving true individual treatment to every offender committed in a State which has adopted it. Mr. Ellingston noted that this work of the Institute appears now to constitute the blueprint for more scientific administration of criminal justice, towards which constructive minds have been groping for more than a century.

The first Youth Correction Authority Act was enacted by California in 1939. Three years later Governor Earl Warren called a special session of the California legislature to pass an act creating an Adult Authority. In 1947 Minnesota and Wisconsin adopted comparable laws based upon the Institute's model Act. This year Massachusetts has adopted legislation similarly based.

Mr. Ellingston declared that the Youth Authority plan is no longer a theory or a hope struggling for practical recognition and trial. The Section on Criminal Law of the American Bar Association has made the promotion of the plan its No. 1 project for the improvement of sentencing, treatment, probation and parole. The publicity attending the Massachusetts report and legislation has stimulated interest in New Hampshire, where legislation is expected to be introduced in 1949. Meanwhile the Institute has received appeals for advice and help in this field in many States, from Maryland to Oregon and Washington. Mr. Ellingston concluded that it seems no longer open to doubt that the Institute launched a creative and remedial idea in the fields of delinquency control and prevention, at a time when the need for it has become widely recognized.

Availability of Courses and Material for Continuing Legal Education

President Harrison Tweed of the Institute, Director John E. Mulder of the Continuing Legal Education Program, and Professor James E. Brenner, Co-Director for the Western area, reported as to the progress being made as to continuing legal education, under a program now three-and-a-half months old. It had its inception in the American Bar Association's pioneering work in the late 1930's and early 1940's, followed by the "refresher" courses for returned veterans.

A conclusion to be drawn from the reports made depicting the situations encountered in the various States and cities seemed to be that the nation-wide picture is variegated and that a variety of methods may be needed in furtherance of the objectives sought. In numerous States and cities, the State and local Bar organizations set up varying facilities, with the aid of the Practising Law Institute and our Association or independently, for acquainting returned veterans with what had developed in decisional and statutory law during their absence; in more than a few instances, these facilities were made available to, and were availed of, by many lawyers aside from the veterans. In some States, law schools and their law reviews did what was deemed needful.

In a number of States, the Bar organizations set up, arranged for and conducted their own highly utilitarian institutes and sessions dealing with special subjects; these have attracted amazingly large percentages of the practicing profession and have been going ahead with marked success and are available agencies for continuing legal education. In other States and localities, virtually nothing appears to have been organized and done on a continuing basis since the "refresher" courses. The consensus appears to be that the profession owes a duty to clients, the public and to itself to provide the means whereby practicing lawyers will be enabled to keep continuously abreast of the developments in the law and obtain the judgment and experience of those versed in specialized fields, to an extent which large numbers of lawyers are unable to do adequately through their own libraries, loose-leaf services, and reading.

It all seemed to add up to a picture that the need is substantial and widespread but that no one pattern or program for meeting it has readily emerged. The State and local Bar Associations, and some of the law schools acting on the "law center" idea, appear to be very much "on the job" and intent on this revitalizing of post-admission legal education and propose to deal with it through their own channels. All of this has created marked difficulties for those who are trying to get a practical national program "down-to-earth"; and it may well be that the nation-wide program will consist mainly of making lecturers, syllabi, and other material available to State and local organizations to the extent that the latter need and wish them as supplementary to their own resources. Adaptation of the program and material to the varying needs of practitioners in the particular State and locality is of course the essence of wisdom in this field.

Points Made and Information Developed in the Institute's Discussions

At the invitation of the American Bar Association, the Institute was selected last February as the national agency for organizing and for meeting the need for continuing legal education throughout the country. The program is being financed at the start by a grant from the Carnegie Corporation. Those working in this field are of the view that the offering will be of the most help to lawyers if it is made available as

lecture courses accompanied by a useful quality of prepared material on the subjects covered. In the larger cities the experience has been that the training is most effective when presented through one lecture a week in a selected field of law practice, over a period of ten or twelve weeks. In smaller cities, where many of the enrollees come from a distance, two or three-day concentrated institutes are looked on as preferable. This is true also where courses have been offered on a Statewide basis in conjunction with annual or mid-winter meetings of State Bar Associations. This experience indicates the desirability of cooperation with Bar Associations and other institutions in the communities.

The basis for the program is that the Institute and our Association are performing a service for the Bar and that the courses and material will be offered where they are wanted. When a course is sponsored in a given locality, major credit is given to the local organization. In some communities the local sponsoring organization is in existence; in others, this is not so. Professor Brenner has been going to many localities to make this project known to existing organizations and offer his services to help create the necessary organizations where they do not exist.

Another problem discussed in the meeting was the necessity for development of effective and helpful material on the subjects to be covered. The Institute hopes to develop all of its own material of a quality comparable to that usually produced by the Institute. Meanwhile it will make use of the syllabi and other material available from the Practising Law Institute.

Specific Courses and Institutes Are Already Projected

A ten-lecture course in labor relations law is planned, and a comprehensive syllabus for it is being prepared. The Institute is studying the possibilities of using motion pictures as an educational device in instruction. A complete trial of a civil action, for example, could be filmed and broken down into from six to eight sections, one section to be offered for an evening. The actual trial could thus be shown from beginning to end, with instructional comments interspersed from time to time.

Some concrete things have already been accomplished in this field. A twelve-lecture course on current problems in taxation was conducted in May in Philadelphia under sponsorship of the Philadelphia Bar Association and the Institute. Courses on the Revenue Act of 1948 are to be offered within the next two months in Omaha, Grand Island, North Platte, Cleveland, New Haven Des Moines, Richmond (Indiana), Minneapolis, and St. Paul. Such a course may be offered also in Birmingham, New Orleans and the District of Columbia and for the State Bar of North Carolina. It is available elsewhere if requested. For the fall and winter there will be a course on fundamentals of federal taxation in Cleveland, under the sponsorship of the Institute and the Cleveland Bar Association. The Georgia Bar Association will offer an Institute course at its mid-winter meeting. In Nebraska several institutes have been asked for, to be given at appropriate points in the State during the coming year. Courses may be given also in Philadelphia, Springfield (Massachusetts), New Orleans, Birmingham and Chicago, and in the States of North Carolina, Indiana, North Dakota, Kentucky and Michigan.

Extended Discussion on Articles of Draft Commercial Code

After the opening session of the Institute, members of the National Conference of Commissioners on Uniform State Laws met with the Institute for further work on the proposed Commercial Code, of which a summary of articles has been given above. Article III (commercial paper), in final draft stage, was extensively discussed. Professor Fairfax Leary of the University of Pennsylvania Law School, reported on the chapter having to do with bank collections; Professor William L. Prosser of the Harvard Law School presented the remainder. The more important further changes made in the draft submitted to the meeting may be summarized as follows: The sections were re-numbered as 101, 201, 301, etc., to permit greater flexibility for further changes. This is a temporary device and the sections are to be numbered consecutively in the final draft. The sections on signature, forgery and alteration were assembled in a new Part IV. A number of new sections on the liability of parties were added. The sections on presentment, notice of dishonor and protest were revised and condensed, the procedure being considerably simplified. The Reporters had prepared extensive notes on the sections, in aid of the discussions at the meeting. These notes, the text of the commercial paper article, and the other articles and notes, are available at the office of the Institute.

Professor Karl N. Llewellyn, of Columbia, and Professor Friedrich Kessler, of Yale University Law School, reported on Article IV (foreign banking). This consists of a chapter on letters of credit and a chapter on foreign remittances. The first of these is nearing completion; still to be included is a re-canvass to see how far special provision may have to be made for domestic credits, followed by another examination of all the material after the completion of the projected chapter on clean credits. The chapter on foreign remittances was presented for the first time, as Tentative Draft No. 1. It will be re-examined in entirety when all of its chapters are completed.

Miss Soia Mentschikoff, of the Harvard Law School, reported on Article V (investment instruments). An interesting discussion of State constitutional law preceded the detailed discussion. At its March meeting the Council of the Institute had voted to delete from Article V all reference to defenses of an issuer which went to

the validity of a security as the term "valid" is defined in the article. The result of such deletion would limit it to third-party claims of ownership. The Reporter presented an extensive summary of the constitutional provisions of all the States, and it was her conclusion that the provision suggested by the reporters could stand. The discussion will be published *verbatim* in the Proceedings of the Institute.

The Reporter on the new Article VI was Professor Louis B. Schwartz, of the University of Pennsylvania Law School. Professor Allison Dunham, of the Columbia University Law School, reported on Article VII (secured commercial transactions), this also being discussed for the first time at an Institute meeting.

It is hoped that the Commercial Code can be completed in 1949. It has been drafted under the over-all supervision of the Chief Reporter, Professor Karl N. Llewellyn, and the Associate Chief Reporter, Miss Soia Mentschikoff. Both expressed extreme gratification at the progress made and the studied consideration given to the material at the meeting. Although the drafting and revision have been in first instance largely in the hands of members of law school faculties, many judges and diligent and studious lawyers have labored to give the drafts the benefit of testing and revision according to the problems which arise in courtrooms and law office advice to clients. Changes voted by the Institute members present will be incorporated in the respective articles; new drafts will be discussed at the meeting of the National Conference of Commissioners on Uniform State Laws in Seattle at the end of August.

Former President Pepper Is Again Toastmaster at Dinner

President and Mrs. Truman received members of the Institute and their wives at the White House on May 21. The other social function of note was the twenty-fifth Annual Dinner of the Institute, on the evening of May 21. Former President George Wharton Pepper was highly felicitous as toastmaster. President Harrison Tweed spoke of the work done and the progress made during the year. The guest speaker was Mr. Justice Felix Frankfurter of the Supreme Court, whose interesting address concerning our profession and the present-day responsibilities of lawyers we hope to obtain for publication in the next issue of the JOURNAL.

The 1948 meeting adjourned on the evening of May 22. As the proposed Commercial Code will be discussed and the first presentation made of material on the income tax project, the 1949 meeting of the Institute will cover four days.

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(Continued from page 566)
relative representation or voting strength of the various states of the world usually stands out as the knottiest. In attempting to cut this knot, the Committee has achieved its *tour de force*. The problem is threefold: *First*, the variations in size, wealth, and population among the various states are so great that, by arithmetical ratio, giving the smallest state one vote results in an assembly of over 5000, which everyone agrees is too large for a legislative body. For example, if the criterion is population and Iceland gets one vote, China should get 3500. *Secondly*, it is difficult to find any single criterion which seems just. Weighting the vote by population alone gives China and India more than one-third of the total and Nepal twice as much weight as Norway. Industrial production as the criterion gives over half the vote to the United States and the Soviet Union. *Lastly*, any criterion that uses arithmetical progression to weight the vote results in a situation where the highest state is hundreds of times more potent than the lowest. This is unattractive to the smaller states, which have always, in international conferences, demanded at least one vote for each state as an entity.[1]

Committee's Formula for Weighting Representation in World Legislature

Instead of some system of weighting by various factors, the Committee bases the vote entirely on population at the beginning, which conforms to the plans devised by the various world federalist groups for a World Constituent Assembly in 1950. The vote is for one delegate per million of population, with each state having at least one. These delegates would form the Federal Convention, where they in turn elect Councilmen to a World Council, which is to be the legislative body. They elect the Councilmen according to the nine regions into which all the world has been divided for that purpose. As an example, Latin America would be one region. Each Latin American state would send one delegate per million of its population to the Federal Convention. At the Convention, all of the Latin American delegates would join to nominate twenty-seven candidates for Councilmen. The Convention then, with each delegate voting individually, would elect nine of the twenty-seven to sit on the Council. The Council, with some special representatives of international organizations, would finally number ninety-nine.

It is beyond my present purpose to explore the full implications of such a scheme, but it is full of interest. The "regions" are said to correspond roughly to the extant "civilizations" and the major hope is that by making the United States one "region", Russia and its satellites one, Western Europe one, and the Far East one, the deadly bi-polar character of present-day international politics can be removed. Weaknesses in the scheme, assuming that it were otherwise acceptable, are that the units upon which representation is based are for the most part today not political realities and that a Councilman so elected will have great difficulty finding his constituents. He would owe his nomination to all the delegates from his region, but he would owe his election to a majority of the more than 5000 delegates from all the world. Although the constitution talks in terms of territorial representation, it has diluted it until it has virtually ceased to exist, except in the "regions" which are substantially one state, notably the United States and the Soviet Union. In spite of these weaknesses and the fact that it suffers at first glance from being too ingenious, this device cannot be lightly discarded as a potential formula. The problem which it seeks to solve is formidable and is that on which most world government speculation soon founders.

Serious Thinking on Details May Produce a Better Draft

In so far as the Committee's objective was to provoke serious thoughts on the details of world government, its draft document should promote that purpose. The draft is provocative, and it raises most of the problems. Endless debate is especially possible on matters of machinery, although the drafters have made some promising departures. And yet all such discussion must await some settled estimate of what the government of the world should do and how much the people of the world will let it do. Members of this Committee have worked on the assumption that the people of the world will not let a world government do anything less than all of what it should do. That such a world constitution would be revolutionary within the United States, that the Committee members and countless others have been unable to persuade Americans to adopt many of these provisions over a considerable period of time, does not seem to daunt or bother the present sponsors.

We need now a new draft—one which keeps the New Deal out of the world constitution, one which does not saddle a new world government with furnishing old-age pensions and much else for more than two billion persons, and the like. Perhaps the Hutchins Committee's efforts will stimulate other speculative persons who have their feet a little deeper in the mud to take up the same problem until it becomes clearer as to just where in fact are the areas of agreement in the world.

1. See Louis B. Sohn: "Weighting of Votes in an International Assembly", 38 *American Political Science Review* 1192 (1944). Sohn proposes a geometric progression of weighting according to population, industrial production and volume of international trade, which would give the largest number of votes as forty (for the United States) and the smallest number as four.

(*Continued from page 595*)

Kaufman, who had become the strongly supported choice of the Democratic party organizations in Manhattan and the Bronx. The other name submitted was that of John F. Sonnett (33 A.B.A.J. 70; January, 1947), an Assistant Attorney General of the United States who is reported to have been the original choice of the party organizations. When the Association of the Bar met on May 11, Chairman Bethuel M. Webster reported for its Committee on the Judiciary as follows:

> On March 26, 1948, following the death of Judge John Bright, we renewed our offer to assist the Attorney General in connection with the appointment of Federal judges in the Southern District of New York, and said that the need to continue the cooperation which preceded the appointment of Judge Medina and Judge Ryan was emphasized by the fact that in the death of Judge Bright we had lost one of our most able and vigorous judges and had thus greatly increased the case load of the remaining judges. We added that owing to illness some of the remaining judges are unable to assume full shares of the work, with the result that the difference between cases filed and cases disposed of is increasing at an alarming rate, and that the need for the appointment of a man of outstanding ability was never greater than it is at the present time. The Attorney General subsequently requested reports concerning two candidates, one of whom we approved. In our reports on these candidates we stressed again the need for a man of honesty, strength of character, judicial capacity, recognized impartiality, and physical vigor.

Chairman Webster also called attention to the statement which President Tweed and he had made on November 1, 1947, that "When other appointments are made, we are hopeful that the standard established by the recent appointment of Judge Medina and Mr. Ryan will be maintained and that the principle of nonpartisanship will be observed".

The President did not send to the Senate the name of the candidate whom the Association had approved. When the name of Mr. Kaufman was submitted, the Association's opposition to his confirmation, on the ground that he was "not qualified" for the office, was expressed.

Mr. Kaufman's nomination has led to a division of opinion among lawyers as to whether or not he should be confirmed. The Committee of the New York County Lawyers' Association has approved his confirmation. The New York *Times* said editorially on May 31:

> It is to be regretted that at a time when the District Court for the Southern District of New York so desperately needs additional judicial help the President did not nominate a candidate who could receive the unanimous endorsement of the organized bar and prompt confirmation. Despite the urgent need for judicial relief for the Court, we hope that the Senate Committee will inquire thoroughly into the qualifications of Mr. Kaufman before acting on his confirmation. Urgency of need should not serve as any basis for compromising the essential qualifications requisite for this important judicial position.

Information available up to the time this issue of the JOURNAL goes to press indicates that the nomination of Mr. Kaufman, along with numerous others in which the Senate Committee on the Judiciary is of the opinion that although the nominees are personable, partisan and political considerations were not sufficiently laid aside in the interests of qualifications and "fair balance", will not be reported to the Senate or confirmed before the adjournment of the present Congress.

Advice to a Young Lawyer

by Judge Joseph C. Story • February 9, 1841

Whene'er you speak, remember every cause
Stands not on eloquence, but on laws.
Be brief, be pointed; let your matter stand
Lucid, in order, solid, and at hand;

Spend not your words on trifles, but condense;
Strike with a mass of thought, not drops of sense;
Press to the close with vigor, once begun,
And leave (how hard the task!), leave off when done;

Who draws a labored length of reasoning out
Puts straws in line for winds to whirl about;
Who drawls a tedious length of learning o'er,
Counts but the sands on the ocean's boundless shore.

Victory in law is gained, as battles fought,
Not by the numbers, but the forces brought,
What boots success in skirmish or in fray,
If rout, and ruin following, close the day?

What worth a hundred posts maintained with skill,
If these all held, the foe is victor still?
He who would win his cause, with power must frame
Points of support, and look with steady aim;

Attack the weak, defend the strong with art,
Strike but few blows, but strike them to the heart;
All scattered fires but end in smoke and noise,
The scorn of men, the idle play of boys.

Keep, then, this first great precept ever near,
Short be your speech, your matter strong and clear,
Earnest your manner, warm and rich your style,
Severe in taste, yet full of grace the while;
So may you reach the loftiest heights of fame,
And leave, when life is past, a deathless name.

7
1948 Ross Prize Essay

(Continued from page 562)

RFC v. *Beaver County*, 328 U.S. 204.) The question remains an important and difficult one, however, and deserves the careful consideration of the National Committee on Intergovernmental Relations.

AT THE STATE AND LOCAL LEVELS

1. *Removing Burdens on National Prosperity.*—Just as the national government should provide over-all policies to maintain national prosperity, State and local governments should remove any unnecessary burdens they may be imposing on such prosperity.

The field of housing is an outstanding example of the need for such State and local action. As stated in the recent Progress Report of Congressman Gamble to the Joint Committee on Housing of the 80th Congress: "Local building codes, municipal ordinances, and certain State laws unquestionably constitute the 'impersonal culprits' in the housing shortage."

There are various State trade barriers that manage to pass constitutional scrutiny but are nevertheless burdens on the national economy. These include certain agricultural inspection laws, certain taxes such as those on aviation fuel, and certain limitations on the use of highways by trucks.

This is pre-eminently a field for joint action in which the National Committee on Intergovernmental Relations can supply needed leadership. Only the State and local governments can take final action, but the National Committee and various agencies of the national government can accomplish a great deal. They can work out desirable standards for building codes. They can develop ways of meeting legitimate State objectives without hamstringing trade. Finally, they can focus nation-wide attention on the need for corrective action.

2. *Redistributing Representation in State Legislatures.*—Local governments, and especially cities, show even greater financial weaknesses than the States. In large measure this is due to the failure of the States to give needed financial and legislative support to their localities. All too often cities receive a shockingly small proportion of State funds and are denied State legislation necessary for them to help themselves.

This situation is frequently a direct result of urban areas having woefully inadequate representation in State legislatures. The necessary remedy is to redistribute representation in State legislatures to reflect shifting populations, just as the representation in the national House of Representatives is periodically redistributed for that purpose.

The problem is found in many States but is often considered peculiar to the particular State. It becomes submerged in local agitation, local rivalries and conflicting personalities. Yet the resulting impairment of local functions can, as we have seen, have truly national consequences.

The National Committee on Intergovernmental Relations will be in a unique position to show the similarity of these problems in different areas, to have them considered on their merits, and to focus on them the nation-wide attention that is necessary in order to get corrective action.

3. *Improving State and Local Planning.*—The "blighted" areas of many modern cities are a direct heritage of past failure to plan for urban development. The current popular demand for federal slum-clearance legislation places this "local" problem squarely on the national doorstep.

The forces which crowded people together in large cities are now being reversed, and urban areas are being swept by tremendous forces of disintegration. People are moving away from the city to the surrounding suburbs. Their leaving creates enormous problems of congested traffic, declining land values, and imperilled city finances. These difficulties will rapidly become more serious.

As pointed out in the Tax Institute's booklet on *Forces Affecting Metropolitan Patterns*, these new problems are even more perplexing than those that arose from the growth of the cities. The history of European cities gave some hint of

what we could expect as our own expanded. But the process of urban disintegration is peculiarly American. It is without precedent and can only be solved by bold, original planning. It should receive prompt and thorough consideration by the National and State Committees on Intergovernmental Relations.

4. *Improving State and Local Finances.*—Although federal grants are the basic remedy for the financial weakness of State and local governments, other steps can and should be taken to improve these finances. Some progress can be made in developing new forms of revenue, but these usually are inequitable and should be applied only with great care. Especially in the case of localities, the chief reliance must continue to be placed on the property tax and on improvements in its administration. Such improvements should take the form of (1) improved assessment and collection, (2) greater classification of property, especially intangibles, (3) cautious use of special assessments, (4) removal of rigid limits on property taxes, and (5) substantial reduction in exemptions from the property tax.

5. *Consolidating and Modernizing Local Governments.*—There are more than 155,000 local governmental units, many of them small and overlapping. Many still have the size and structure of the horse-and-buggy days when they began. They do not fit modern needs, and their inefficiency drives power elsewhere.

In many cases they should be consolidated to form functional units that are more suited to present-day needs. This would give stronger local government, more popular control of such government, and more services per tax dollar. It would tend to correct that local weakness that has been driving powers to the State and national governments.

IV. CONCLUSION

This essay presents a rounded program for restoring State and local powers. It attacks the basic causes of overcentralization rather than the symptoms. Part of the program can be changed without affecting its core.

1. The basic attraction of power to the national government should be corrected by National and State Committees on Intergovernmental Relations. These Committees can guide national public opinion into channels that will strengthen State and local authority rather than weaken it.

2. The basic repulsion of power by the State and local governments grows out of their financial weakness and should be corrected by a bold policy of federal grants. The funds should be allocated on a size-of-job basis rather than a fund-matching basis.

3. Within this framework of basic remedies, the national, State and local governments, with the assistance of the National and State Committees on Intergovernmental Relations, should take further steps to restore State and local powers. At the national level these should include maintenance of over-all prosperity, further crediting of State taxes against federal taxes, and provision for State and local taxes (or equivalent payments) on federal property. At the State and local levels these should include removal of burdens on national prosperity, redistribution of representation in State legislatures, improved State and local planning, improved State and local finances, and consolidation and modernization of local governments.

These steps are not easy. That is because the problem is not easy. But the program is well within the reach of an America determined to preserve its free heritage. The broad outlines can be quickly adopted, with details coming later. It is a program around which all Americans of good will can rally to preserve our American Federal System.

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